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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1450

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this matter on February 1, 1973.

OPINIONS BELOW

The February 1, 1973, opinion of the Court of Appeals, as yet unreported, is reprinted as Appendix B to this Petition. The August 18, 1971, opinion of the United States District Court for the Southern District of Indiana, is

reported at 332 F.Supp. 655, and is reprinted as Appendix A herein.

JURISDICTION

The judgment of the Court of Appeals was entered on February 1, 1973. The petition for Certiorari was filed less than 90 days from the date of the judgment of the Court of Appeals. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the legal standards used in the Courts below to determine the presence of *de jure* segregation, which have been applicable to school boards in determining the effectiveness of a school desegregation plan (*i.e.*, remedial cases), are also applicable to school boards in determining the presence of *de jure* segregation in the first instance (*i.e.*, initial violation cases).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, 42 U.S.C. § 2000c-6(a) and (b), and 28 U.S.C. § 1345. These provisions have been reprinted in Appendix C herein.

STATEMENT OF THE CASE

The jurisdiction of the United States District Court was invoked pursuant to 42 U.S.C. § 2000c-6(a) and (b), and 28 U.S.C. § 1345.

On May 31, 1968, the United States filed a school desegregation action in the United States District Court for

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the Southern District of Indiana, the Honorable S. Hugh Dillin, presiding trial judge. The Defendants in said cause were the Board of School Commissioners of the City of Indianapolis, Indiana, and its individual members (hereinafter referred to as the Defendants). On August 18, 1971, the trial judge filed a Memorandum of Decision in favor of the Plaintiff, United States, and directed orders against the Defendants. That opinion is recorded at 332 F. Supp. 655 (1971), and is set out as Appendix A herein.

On September 10, 1971, the Defendants filed a Notice of Appeal pursuant to Rule 3 of the Federal Rules of Appellate Procedure to the United States Court of Appeals for the Seventh Circuit. That Court, after hearing argument on September 13, 1972, affirmed the judgment of the District Court on February 1, 1973, in a written opinion, which is set out as Appendix B herein.

The Indianapolis Public Schools

The Indianapolis Public School System has existed pursuant to the law of the State of Indiana since 1853. The situs of the school district is in the City of Indianapolis, Indiana.

During the 1970-71 school year (immediately prior to trial), the Defendants operated 110 Elementary Schools and 11 Senior High Schools. Among the 110 Elementary Schools, there were 6 Junior High Schools and 3 Special Education Schools. The remaining Elementary Schools housed either kindergarten through 8th grade or kindergarten through 6th grade students.

The racial composition of the student population from 1966 to the present, based upon Fall Enrollment figures, is shown by the following table:

Year	Negro	White	Total	% Negro
1966	34,481	73,005	107,486	32%
1967	35,699	73,044	108,743	33%
1968	36,586	72,025	108,611	34%
1969	37,692	70,530	108,222	35%
1970	38,126	68,188	106,314	36%
1971	38,799	63,935	102,734	38%
1972	38,630	59,167	97,797	40%

The Evidence

Prior to 1949, statutes existed in the State of Indiana which permitted, but did not require, the establishment of all-Negro schools. During the 1948-49 school year, the Defendants maintained 16 all-Negro Elementary Schools and all-Negro Crispus Attucks High School. During that school year, these 17 schools housed 94.6% of the Negro student population. 332 F.Supp. at 665, App. p. A17.[1] The remaining 5.4% of the Negro student population attended racially-mixed schools.

In 1949, the Indiana General Assembly passed an Act which required all Indiana schools, including the Defendants, "to provide, furnish and make available equal, non-segregated, non-discriminatory educational opportunities and facilities for all regardless of race, creed, national origin, color or sex. . . ."[2] The Act further required the Defendants to permit students entering for the first time the public kindergartens, the first grades of Elementary Schools and first year departments of Senior High or Junior High Schools to enroll in the school within their district. This enrollment pattern was to continue in

1. Citations to the Appendix will be given as "App. p. —."
2. Acts 1949, Ch. 186, § 1, p. 603; Indiana Statutes Ann., § 28-6106 (1970 Repl.). For the entire Section, see Indiana Statutes Ann., § 28-6106—28-6112 (1970 Repl.), or IC 1971, 20-8-6-1 through 20-8-6-7.

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the future so that eventually each school in the system would be attended by students living within that particular school's district.

In 1953, the Defendants drew fixed boundary lines for all Elementary Schools. In drawing these boundaries, attempts were made to maximize utilization of facilities as well as to permit students to attend the school nearest their residence. Limited optional attendance provisions were in effect in some of the attendance districts (PX 88).[3] At the close of the 1953-54 school year, 3, 766 Negro students (approximately 28% of the total Negro enrollment) were attending schools with white children, which schools, prior to the 1949 statute, had been predominantly or all white schools (PX 1, 1953-54 School Year). Moreover, in 1953-54, white and Negro children were enrolled together in a total of 61 schools; by 1967-68, the number of such schools had increased to 90. (PX 1) Thus, it cannot be seriously contended that the Defendants were maintaining a dual school system (a system composed of separate, but equal, facilities) in 1954 or 1968.

From 1954 to the 1967-68 School Year, the student enrollment in the Elementary Schools increased from 53,352 to 82,853. 332 F.Supp. at 666, App. p. A19. Accordingly, the number of schools rose from 87 regular Elementary and Junior High Schools to 113; the number of High Schools increased from 8 to 11. 332 F.Supp. at 666-667, App. p. A19. During this same 13 year period, the total Negro student enrollment increased from 13,501 to 35,699, a gain of 22,198 (PX 1).

From 1950 to 1970, the increase in the Negro population located within the center-city was substantial; during that

3. Exhibits will be identified by reference to the party below introducing them; *i.e.*, "PX——" and "DX——" for Plaintiff's and Defendants' exhibits, respectively.

same period, the white population in the center-city decreased. (DX K-1 through K-14) Therefore, many schools which were predominantly white in 1954 were predominantly black in 1968. (PX 1)

The most notable exception to this population expansion trend is found in the trial court's discussion concerning the location of "low-rent" housing projects. 332 F.Supp. at 673, App. p. A31. The impact on the schools due to the location of these projects was substantial in later years. 332 F.Supp. at 673-674, App. pp. A31-32.

The increase in population over the 1954-68 period caused overcrowding problems in many of the schools. The methods employed by the Defendants to alleviate overcrowding were varied: *e.g.*, additions to existing schools, construction of new schools, attendance zone boundary changes, portable classrooms, or combinations of the above.

Prior to the 1968-69 School Year, it was the policy and practice of the Defendants to assign teachers to schools so that, in general, the faculty at each school mirrored the racial composition of the school's student body. This fact was stipulated by the Defendants, and both parties agreed generally to the relief ordered by the trial court on August 5, 1968. All vestiges of this practice were erased prior to trial. (DX DD and EE)

The Finding of Fact and Trial Court Rulings

The charge against the Defendants was other than that they maintained a dual school system. It was that the Defendants had developed school boundary changes, feeder patterns, teacher assignments and school construction policies which *in some instances* had the effect of segregating students on the basis of race.

The District Court made extensive findings of fact, and some of those findings were related to the Government's evidence. But much of that Court's opinion did not concern the Defendants; rather it was an extended denunciation of the State of Indiana and its whole people, living and dead, from before 1816 to the present time. The spirit of that remarkable assertion is the District Court's proposition that because the State of Indiana was "founded" by persons who came, in part, from the State of Virginia, it became infected with the "culture of the southern country gentleman," 332 F.Supp. at 659, App. p. A7, and the racial attitudes of such persons as a former President, William H. Harrison. The State of Indiana and her people, condemned in origin, remained thus condemned and contaminated for all time to come, or at least until August 18, 1971.

That portion of the District Court's finding was neither attacked nor defended on appeal because it was thought to be neither relevant nor material to the issues raised by the Complaint. It is referred to here only because it shows the mind-set with which the District Court approached the remaining evidence in the case.

The gist of the District Court's evidentiary analysis is that there was a *duty incumbent upon the Defendants to effect a racial balance* among the children of different races in the public school system. Thus, every act or omission of the Defendants from 1949 to August 18, 1971, which failed to effect a racial balance in the public schools was found by the District Court to constitute an act of *de jure* segregation.

The following acts and/or omissions are typical of those found by the District Court to constitute *de jure* segregation:

1. In regard to the fixed attendance district boundary lines which were drawn in 1953, the Court found:

> "Not only did the Board not attempt to promote desegregation, but the boundary lines tended to cement in the segregated character of the elementary schools." 332 F.Supp. at 666, App. p. A18.

With this finding, the Court condemned for all time the establishment of neighborhood schools for any city such as Indianapolis where the Negro population (in 1953) was located almost entirely in one section of the city. (DX K-12 through K-14) The trial court even recognized that, generally, the pre-1949 "colored" schools were located in Negro residential areas. 332 F.Supp. at 665, App. p. A17. Therefore, many of these schools remained predominantly, but not entirely, Negro. In retrospect, it is abundantly clear that after 1949 the only proper course of action for the Defendants—which would have been approved by the District Court—would have been to transfer Negro children into schools located in almost all-white neighborhoods and to transfer white children into schools located in almost all-Negro neighborhoods, thus effecting a racial balance. The "failure" to do this in 1953 provided the District Court in 1971 with an "original sin."

2. In regard to the 1953 boundary lines, the Court further found:

> "In some instances segregation was promoted by drawing boundary lines which did not follow natural boundaries or were not equidistant between schools." 332 F.Supp. at 666, and see f.n. 54, App. p. A18.

The Court first observed that the common boundary line for Schools #36 and #60 was not equidistant between the two schools (see map, PX 169, p. 7). The Court then noted that Negro students were required to cross what could be

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referred to as "natural" boundaries to attend Schools #42 (100% Negro in 1953-54) and #26 (99.8% Negro) rather than being required to attend Schools #44 (1.2% Negro) and #10 (9.7% Negro), respectively.

Here the Court merely searched the record and found three boundary lines (in a school system composed of 87 regular Elementary and Junior High Schools in 1954) which, had the boundaries been drawn in a different manner, may have temporarily resulted in a greater racial balance in three of the six schools involved. The Court did not consider in its opinion whether or not the lines were drawn in a logical or reasonable manner in view of all of the facts and circumstances involved. More importantly, the Court did not attempt to explain, nor did the evidence show, how these 1953 boundary lines promoted or effected segregation consistent with that found in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, (1954) *(Brown I)*. And the facts are that the predominantly Negro schools (#26, #36 and #42) remained predominantly Negro up until the time of trial when they were 97.1%, 100% and 100% Negro, respectively. (PX 1) The predominantly white schools (#10, #44 and #60) became predominantly Negro as the Negro population increased and migrated (their movement not being restricted) into those districts. This is best illustrated by the following table, using data from PX 1:

Year	% of Negro School #10	% of Negro School #44	% of Negro School #60
1954-55	11.12%	2.32%	21.69%
1956-57	20.10%	11.99%	37.07%
1959-60	36.33%	60.60%	42.00%
1967-68	74.42%	98.12%	95.49%

It is patently clear that the 1953 boundary lines were not the first step of an attempt to maintain "white" and "black" schools. These three boundaries were condemned, however, because they failed to effect a greater racial balance in the public schools in 1953, prior to the *Brown I* decision.

3. After noting that racial imbalance in the schools still existed at the advent of the post-*Brown I* era, the Court stated:

> "The Board thus began the post-*Brown I* era in May, 1954, in substantially the same position that it ended the official segregation era in 1949. The schools were still segregated by operation of law, by virtue of the acts and omissions of the Board done in defiance of the new requirements of Indiana law." 332 F.Supp. at 666, App. p. A19.

This finding was clearly erroneous and historically false. The State of Indiana has never had an "official segregation era." Furthermore, after 1949, Indiana law only required that children be permitted to enroll in the school within their district and it still does; there was no requirement that any degree of racial balancing was to be achieved. As will be seen, this finding proved to be significant in the Court of Appeals. There it was found sufficient to taint an entire school system and also to justify the application of remedial case law standards to every future act or omission by the Defendants which failed to effect a racial balance in the schools.

4. It was found that the Defendants had "built additions at Negro schools and then zoned Negro students into them from predominantly white schools. . . ." 332 F.Supp. at 667, also see f.n. 56, App. p. A20.

The facts are that, far from promoting segregation, the change which resulted (and was condemned) actually pro-

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moted integration—as shown by the following analysis. It should first be observed that the addition to School #36 was recommended as early as February, 1957. (PX 49) The predominantly white school, School #60, was 47.1% Negro before the boundary change and was 42.0% Negro after the boundary change. (PX 1) School #36 dropped from 99.9% Negro to 96.4% Negro after the boundary change. (PX 1) The percentage of Negro students at both schools was thus altered in a direction which approached the then city-wide elementary percentage of 24.6%. However, because it failed to achieve the Court's desired racial balance, it was found to be an act of *de jure* segregation.

5. The trial court found that the Defendants had "failed to reduce overcrowding at schools of one race by assigning students to use newly built capacity at schools of the opposite race." 332 F.Supp. at 667, see also f.n. 57, App. p. A20. The essence of this holding is that the District Court again condemned the Defendants for failing to effect a racial balance some fourteen years previously by their failure to assign white students at School #51 to fill the eight-room addition completed at School #37. The court apparently disregarded the Housing Facilities Report for February, 1957, which indicates that "all classrooms within the addition opened just a year ago are filled." (PX 49) The average class size for the elementary grades at School #37 in the fall of 1958 was 35.6. (PX 39, p. 92) At that same time, the average class size at School #51 was 35.0. (PX 39, p. 92) The city-wide average for Elementary Schools in the fall of 1958 was only 34.5. (PX 39, p. 95) Clearly, no class size improvement would have been realized if the defendants had assigned School #51 pupils to School #37. Such a move would have necessitated a simultaneous reassignment of School #37 pupils to School #51. It should also be observed that the Defendants did

not prevent Negro students from attending School #51. As the Negro population migrated into the School #51 attendance district the percentage of Negro students at School #51 gradually increased. Thus, during the 1960-61 school year, the percentage of Negro students at School #51 was 5.09; during the 1962-63 school year, the percentage increased to 18.5; during the 1964-65 school year, the percentage had increased to 31.28; during the year this action was filed, the percentage of Negro students at School #51 had increased to 55.61. (PX 1) Nevertheless, the Defendants' failure to assign School #51 pupils to School #37 in 1957 or 1958, and thus effect a racial balance, was found to be an act of *de jure* segregation.

6. Unquestionably, one of the most important findings made by the District Court concerned attendance zone boundary changes:

> "According to the evidence, there have been approximately 350 boundary changes in the system since 1954. More than 90% of these promoted segregation." 332 F.Supp. at 670, App. p. A25.

The finding was clearly erroneous. Indeed, it is incredible, and tragically so. At trial, the Defendants read into evidence a list of boundary changes, by year, involving the boundaries for some thirty-two schools. (Tr. p. 761)[4] This evidence was offered only to prove that the Defendants had authorized various boundary changes in the past which improved the racial distribution for the schools involved. Subsequent investigation revealed certain errors in this list which were corrected by an exhibit (DX XX). This is the only evidence touching that finding.

The District Court did not understand. It concluded (erroneously) that those thirty-two boundary changes (out of a total of approximately 350 boundary changes since

4. Citations to the Transcript of the trial will be given as "Tr. p. —."

1954) were the only changes which resulted in an increase in the racial balancing of Negro children and white children in the schools, and that the remaining boundary changes therefore "promoted segregation." Furthermore, the Defendants offered the list of 32 schools as an example to show that numerous boundary changes had been made which caused a greater mixing of the races; the Defendants certainly did not contend that these boundary changes were the only boundary changes which increased the racial balance in the schools. In fact, a list of all boundary changes since 1954 indicating the schools involved was admitted in evidence. (PX 27) If one compares the racial composition of a school in the year immediately prior to a boundary change with the racial composition of that school in the year immediately following the change, one discovers that approximately 83 boundary changes improved the racial distribution in the schools (improved in the sense that the racial distribution was altered in a direction toward the then city-wide racial percentage figure). Further analysis reveals that 111 boundary changes altered the racial distribution in a direction away from the city-wide percentage. The remaining boundary changes resulted in essentially no change in racial distribution. (Compare PX 1 with PX 27) So two manifest errors developed in the District Court: (1) it erroneously used and computed percentage figures, and (2) it concluded that any boundary change which did not effect a racial balance was an act of *de jure* segregation.

Thus in this sense, the case represents a first full circle in desegregation litigation in the United States: acts which effected a racial mixture years ago (integration) are today called acts of "segregation" by the District Court, so that now the District Court can order a racial mixture pursuant to its own quota.

Petitioners do not intend to belabor this Court with a further extensive analysis of the evidence produced at trial; such an approach is more properly the subject matter of a brief. It was believed necessary, however, to firmly establish by the foregoing examples that the District Court approached the evidence with the view that Defendants were under a legal obligation to effect a racial balance in the schools. On appeal, the Defendants correctly argued that the racial imbalance which existed in the Indianapolis Public Schools was the result of other events, arising from housing patterns, and the like, and that the evidence was totally insufficient to support a finding of *de jure* segregation.

The Court of Appeals

Despite the fact that the evidence in the present case is almost identical to that found in *Bell* v. *School City of Gary, Indiana* (7th Cir., 1963), 324 F.2d 209, *aff'g.* 213 F.Supp. 819 (N.D. Ind., 1963), the Court of Appeals distinguished *Bell,* stating:

> "The present case—in which, as will be discussed below, the district court found gerrymandering of districts, segregation of faculty, and other indicia of a dual system—stands in marked contrast to the *Deal* and *Bell* cases, above, where the district courts made specific findings of no such discriminatory practices by the boards." (Docket No. 72-1031, CA 7, February 1, 1973, Slip Opinion, p. 4, App. p. A51)

The Court further observed:

> "In *Bell,* there was a specific finding that there was no change in the school district boundary lines, and thus no gerrymandering. Also in *Bell* there were examples of black students being transferred from predominantly black schools to predominantly white schools to relieve overcrowding." (Docket No. 72-1031, *supra,* f.n. 5, p. 4, App. p. A51)

The above language with which the Court of Appeals so easily disposed of one of the major contentions made by the Defendants on appeal is deserving of comment. First, it was observed that there were no boundary changes in the *Bell* case; this observation is quite remarkable due to the fact that nearly three pages of the trial court's memorandum of decision in the *Bell* case were devoted to the discussion of certain school boundary line changes in Gary, Indiana, made both *before Brown I* and *after Brown I*. See *Bell, supra,* 213 F.Supp. 823-825. Secondly, the Court of Appeals found great significance in the fact that there were examples in *Bell* of Negro students being transferred from predominantly black schools to predominantly white schools to relieve overcrowding. This practice was in effect for three schools at the time of trial in the *Bell* case. See *Bell, supra,* 213 F.Supp. at 826. These transfers were not in effect for those schools at the close of the 1961-1962 school year. See the chart depicting the number of students, by race, in the Gary, Indiana, schools, 213 F.Supp. at 821. The *Bell* case was decided on January 29, 1963; thus the transfer examples referred to by the Court of Appeals were instituted for the fall of 1962, probably either just before or just after suit was filed. Compare this with the statement made by the Court of Appeals in the present case:

> "A school board . . . cannot blithely say that it has become 'color blind' the day before a suit is filed and thereby avoid liability." (Docket No. 72-1031, *supra,* p. 3, App. p. A49)

With that statement in mind, Defendants cannot explain or understand why the Court of Appeals was so impressed with the transfer examples found in *Bell.* The Defendants are inclined to suspect that the Court of Appeals has found a distinction . . . without a difference. This distinction

was necessary however, because without it, the Court of Appeals could not have attempted to justify the trial court's approach to the evidence; *i.e.*, that the Defendants had a constitutional duty to effect a racial balance in the public schools. To accomplish this latter goal, it was necessary to determine that the "differences" which existed between the *Bell* case and the instant case were not merely sufficient to support a finding of segregatory practices aimed at a few schools; rather, these "differences" were found sufficient to support a finding of the existence of a *de jure* segregated school "system" in the City of Indianapolis in 1954. The Court of Appeals did not indicate how many schools, or which schools were *de jure* segregated; it only indicated that the "system" was *de jure* segregated, and the evidence is uncontradicted that a dual school system did not exist.

Having found a *de jure* segregated school system in Indianapolis in 1954, the Court of Appeals then affirmed the District Court's view that the Defendants were under an affirmative duty to effect a racial balance in the schools, holding:

> "Another principle which comes into play in examining the district court's opinion relates to the affirmative duty placed on a school board 'to convert to a unitary system in which racial discrimination would be eliminated root and branch' *Green* v. *County School Board of New Kent County,* 391 U.S. 430, 437-38 (1968). This affirmative duty attaches to any school system guilty of *de jure* segregation at the date it became illegal under *Brown I,* May 17, 1954. . . . It is in this sense clear that factors viewed as being reflective of *de jure* segregation in remedial cases would be similarly significant in the initial determination of whether or not there has been a violation of constitutional rights. It is in this way that the remedial cases are relevant to the

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present case." (Docket No. 72-1031, *supra*, p. 3, App. p. A49)

The Court of Appeals went on to discuss the acts which were found by the District Court to constitute acts of *de jure* segregation, and applied constitutional standards applicable to remedial situations. It then affirmed the District Court's judgment in all respects.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted Because The Court of Appeals Has Decided An Important Question of Federal Constitutional Law Which Has Not Been, But Should Be, Settled By This Court.

In *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954) *(Brown I)*, this Court determined that in the field of public education segregation on the basis of race was a deprivation of equal protection of the laws as guaranteed by the Fourteenth Amendment. The Negro children involved in *Brown I* "had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race." *Brown I, supra*, 347 U.S. at 488. In *Brown* v. *Board of Education of Topeka*, 349 U.S. 294 (1955), *(Brown II)*, this Court concluded that school authorities who were maintaining racially segregated school systems (such as the type condemned in *Brown I*) were thereafter required "to achieve a system of determining admission to the public schools on a non-racial basis. . . ." *Brown II, supra*, 349 U.S. at 300-301. In *Alexander* v. *Holmes County Board of Education*, 396 U.S. 1218 (1969), a dual school system was defined as one having "one system for white students only and one system for Negro students only." 396 U.S. at 1218.

The instant case presents a situation strikingly different from the one presented in *Brown I*. Of great significance is the fact that Negro children were not being denied admission to schools attended by white children in the year 1971 (time of trial), the year 1968 (year suit filed), or the year 1954 *(Brown I decision)*. Furthermore, neither prior to 1954 nor at anytime thereafter, did the Defendants maintain a "dual" system as that term was defined in *Alexander* v. *Holmes County Board of Education, supra.* These facts are undisputed; therefore, under the existing law as enounced by this Court, it cannot be found that the Defendants—either at the advent of the post-*Brown I* era or at anytime thereafter—maintained a dual school system.

In the instant case, the trial court observed that racial imbalance existed in the Indianapolis Public Schools at the advent of the post-*Brown I* era, and concluded that the Defendants maintained a *de jure* segregated school system. 332 F.Supp. at 666. The Court of Appeals affirmed the validity of this approach, stating:

> "(E)ven though no particular racial balance is *per se* necessary, *Swann* does not say that such imbalance may not be considered as one factor from which the district court may infer a segregatory intent." (Docket No. 72-1031, CA 7, February 1, 1973, Slip Opinion, p. 5-6, App. p. A52)

Thus the Court of Appeals took this Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), to stand for the proposition that *although a racial balance is not necessary, if it does not exist, segregatory intent is a permissible inference.*

The Court of Appeals then condemned the boundary lines which were drawn prior to *Brown I,* citing, for example, *United States* v. *Board of Education, Independent School District No. 1, Tulsa County, Oklahoma,* 429 F.2d 1253

(10th Cir. 1970). The boundaries in the *Tulsa* case, however, were drawn for the 1955-1956 school year during the post-*Brown I* era when the Tulsa defendants were under a constitutional obligation to dismantle a dual school system. See, *Tulsa, supra,* 429 F.2d at 1255.

The Court of Appeals went on to note numerous other acts of *de jure* segregation citing, in addition to *Swann, supra,* such cases as *Green* v. *School Board of New Kent County,* 391 U.S. 430 (1968), *Raney* v. *Board of Education of the Gould School District,* 391 U.S. 443 (1968), and *Monroe* v. *Board of Commissioners of the City of Jackson,* 391 U.S. 450, (1968). All of those cases involved *dual school systems;* all of those cases related to the remedial stage of the litigation when this Court was concerned with setting out standards or guidelines by which the effectiveness of a desegregation plan could be determined.

The Court of Appeals upheld the trial court's ultimate finding of *de jure* segregation, stating:

> "Although it might not be possible to infer the requisite discriminatory intent from any one instance or example in the record, it is clear that the district court found a purposeful pattern of racial discrimination *based on the aggregate of many decisions of the Board and its agents.*" (Our emphasis) (Docket No. 72-1031, *supra,* p. 5, App. p. A51)

Defendants attempted to defend against the Plaintiff's complaint under case law which spoke to the necessity of establishing segregatory intent and causation; *e.g., Taylor* v. *Board of Education of City School District of New Rochelle,* 195 F.Supp. 231 (S.D.N.Y. 1961), *aff'd.,* 294 F.2d 36 (2d Cir. 1961), *cert. denied,* 368 U.S. 940 (1961); *Bell* v. *School City of Gary, Indiana,* 324 F.2d 209 (7th Cir. 1963), *cert. denied,* 377 U.S. 924 (1964); *Deal* v. *Cincinnati Board*

of Education, 369 F.2d 55 (6th Cir. 1966), *cert. denied,* 389 U.S. 847 (1967). Defendants were certainly not prepared—nor should they have been required—to defend the effectiveness of a "desegregation plan" because in all prior school segregation cases it has first been necessary for the complaining party to establish that *de jure* segregation *existed* before the effectiveness of a plan became an issue. It is clear, however, that the District Court and the Court of Appeals were of the opinion that remedial case law was applicable.

Thus the question presented for review is whether a city, such as Indianapolis, which—prior to, at the advent of, and after the *Brown I* decision—has maintained what heretofore has been recognized in the law as a unitary school system, may be found guilty of *de jure* segregation by the application of constitutional standards previously expressed in remedial case law dealing with the dismantling of dual school systems. If the answer to this question is in the affirmative, this decision will have a tremendous impact on all cities which have established and maintained a "neighborhood school" attendance concept where substantial "*de facto* segregation" exists due to housing patterns. On Petition, Defendants assert that this is a new and important question of law which was erroneously decided in the courts below.

CONCLUSION

Wherefore, petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

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Appendices

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APPENDIX A

UNITED STATES OF AMERICA,
Plaintiff,

v.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL., DEFENDANTS.

United States District Court, S. D. Indiana, Indianapolis Division.
No. IP 68-C-225
Aug. 18, 1971.

MEMORANDUM OF DECISION

DILLIN, District Judge.

This action, filed May 31, 1968, was tried by the Court on July 12-21, 1971. The Court has considered the voluminous testimony, the more than 200 exhibits, the post-trial briefs, has taken judicial notice of certain historical facts believed to be matters of common knowledge, and now files its findings of fact and conclusions of law in the form of this memorandum. Rule 52(a), Federal Rules of Civil Procedure.

I. GENERAL

This is a school desegregation action brought by the United States pursuant to Section 407(a) and (b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6(a) and (b). The defendants are The Board of School Commissioners of Indianapolis, Indiana (hereinafter "School Board" or "Board"), the members of the Board, and its appointed Superintendent of Schools.

The defendant School Board is a common school corporation organized and existing under the laws of the State of Indiana. It is situated within Marion County, Indiana, and governs, manages, and controls all of the public elementary and high schools within a geographical area known as the School City of Indianapolis (hereinafter "School City"), all as required by Indiana law. The shape of the School City resembles that of a trussed fowl, with its head to the north, its bound feet to the south, and its flapping wings

extending east and west. The east-west wingspread, at its greatest, is about 16 miles. The north-south dimension of the School City is about 13 miles.

During the 1970-71 school year, the School Board operated 110 elementary schools. The usual (but not invariable) grade structure of the elementary schools was a kindergarten-through-eighth-grade structure. Among these 110 schools were 6 junior high schools. During the 1970-71 school year, two of the elementary schools were devoted entirely to the education of mentally retarded children, and one of the elementary schools was devoted entirely to the education of physically handicapped children and children having both physical and mental handicaps.

During the 1970-71 school year, the School Board operated 11 high schools. With the exceptions hereinafter noted, each of these high schools housed students in grades 9 through 12 who had attended one of the "feeder schools" regularly assigned to the particular high school. The exceptions to these general statements are that Cripus Attucks High School (hereinafter "Crispus Attucks") housed students in grades 10 through 12 only, its 9th grade class having been divided between the newly acquired Cold Spring Campus and Northwest High School (hereinafter "Northwest") and that Shortridge High School (hereinafter "Shortridge") housed a 9th grade made up of students from assigned "feeder schools" and 3 classes of students who were attending Shortridge under "the Shortridge Plan." Also, a comparatively small number of students were transferred to high schools other than those to which originally assigned, pursuant to the transfer policies of the Board.

The total enrollment in the elementary schools at the close of the 1970-71 school year was 77,658 students (excluding special education students). Negro students constituted 37.4% of that total. The total enrollment in the high schools at that time was 22,487 students. Negro students constituted 33.6% of that total. There were approximately 4,379 faculty members, of whom 976 (22%) were Negro.

Of the seven persons currently serving as members of the School Board three are Negroes (Mrs. Cary D. Jacobs, The Reverend Landrum E. Shields, and Mr. Robert D. DeFrantz). Mr. Shields served as President of the School Board from the date of the Board's first meeting in July, 1970, until July 13, 1971, on which latter date Mr. DeFrantz was elected to the Presidency, in which position he presently serves. The Board does not appear to be polarized along racial lines, and the personnel of central administration, operating under the direction of the Superintendent, likewise reflects a reasonable racial balance.

On February 6, 1970, an Indiana not-for-profit corporation, Citizens of Indianapolis for Quality Schools, Inc., attempted to intervene herein as a party defendant, asserting that its membership consisted exclusively of parents of students in the Indianapolis public schools who possessed a legally cognizable interest in the proceeding on such account. The motion to intervene was accompanied by petitions executed by some 5,000, more or less, parents who requested such intervention. The petition to intervene was denied by the Court, for the reason that the corporation did not appear to have an interest sufficient to permit intervention as of right pursuant to Rule 24 (a) (2), F.R.C.P. *Hobson* v. *Hansen,* D.C. Dist., 1968, 269 F.Supp. 401; *Blocker* v. *Board of Education of Manhasset, New York,* E.D.N.Y., 1964, 229 F.Supp. 714. Permissive intervention was also denied. However, Mr. Harold E. Hutson, attorney for the petitioner, was permitted to appear as amicus curiae, and in such capacity he attended the trial, was furnished with copies of all exhibits, and participated in the argument and post-trial briefing.

II. The Issues

There are but two ultimate factual issues in this case, and two critical dates. The two dates are May 17, 1954, the date of the decision of the Supreme Court of the United States in *Brown* v. *Board of Education of Topeka* (*"Brown I"*), 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, 38 A.L.R.2d 1180, and May 31, 1968, the date on which this suit was filed.

Brown I, of course, held that in the field of public education the doctrine of "separate but equal" has no place, and that segregation of children in public schools by operation of law solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprives the children of the minority group of equal educational opportunities and hence of the equal protection of the laws guaranteed by the Fourteenth Amendment. Approximately one year later, in the same case (*"Brown II"*), 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, the Court ordered the District Courts involved in *Brown* and its companion cases "to take such proceedings and enter such orders and decrees * * * as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases." It thereupon became the duty of all of the States, operating through their various agents, i.e., boards of school commissioners and the like, such as the defendant Board, to desegregate such school corporations as were practicing *de jure* segregation of their pupils as of May 17, 1954.

The two ultimate issues herein may therefore be stated as follows:

1. Did the School Board operate a dual school system, or, put another way, did it have a deliberate policy of segregating minority (Negro) students from majority (white) students in its schools on May 17, 1954?

2. If the answer to the first question is in the affirmative, had the Board changed its policy so as to eliminate such *de jure* segregation on or before May 31, 1968?

The plaintiff United States of America has the burden of proving the affirmative of the first issue and, if proved, the negative of the second. The defendants deny *de jure* segregation on either of the critical dates, and further urge that a third critical date must be considered: the date of trial. Their argument in the latter connection is that no matter what may have gone before, if the Board is operating a unitary system as of the date of trial there is no justification for judicial intervention or for the granting of relief in equity.

As will be set out in more detail hereafter, the Court finds for the plaintiff on each of the ultimate issues of fact. The argument that conditions as of the date of trial should control the action is rejected, first for the legal reason that complaints, and the proof of same, must relate to conditions as of the date of filing; plaintiff is always entitled to judgment, if only for costs, if it proves the essential elements of its complaint as of such time. It is true that the initiation of a legal action may, and frequently does motivate the defendant to grant all or part of the relief sought prior to trial, thus rendering the action moot in whole or in part. In a simple action such as a suit on account, where the only relief sought is money, it is obvious that payment in full by the defendant before trial would effectively render the action moot for all time, save for payment of costs. Where the relief sought is equitable, however, particularly in a complex case such as this where the equitable relief sought is affirmative rather than being limited to a negative injunction, voluntary compliance in advance of trial would not deprive the Court of jurisdiction to insure the continuation of such compliance by appropriate orders. In any event, however, the Court finds that the Board had not, as of the date of trial, effectively desegregated its school system to the extent required by *Brown II*.

III. History

Perhaps one of the greatest public misunderstandings as to the operation of the public schools of the State of Indiana is that the responsibility for the conduct of such schools is purely local. It is not difficult to understand the basis for such misconception as the schools are, as a practical matter, operated by local boards, locally elected, subject only to the general oversight of the Indiana State Board of Education and the State Superintendent of Public Instruction. They are paid for to a large extent by funds derived from local property taxes. That part of the property tax allocated to the funding of the public school system constitutes by far the largest portion of the taxes levied in every taxing unit of the State. (The 1971-72 budget adopted by defendant Board is in excess of $82,000,000.)

Nevertheless, the fact remains that the ultimate responsibility for the public schools, and the duty to provide a "general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all" is placed squarely upon the State.[1] It has therefore been held in numerous cases that the State school system is a State institution, and that school corporations organized under, or by virtue of, the laws of the State are but the agents of the State.[2] Therefore, in reviewing briefly the events leading up and contributing to the educational plight of the Negro in Indianapolis in 1954, 1968, and at present, it is necessary and proper to consider historic policies of the State and various of its agencies, as well as the acts and omissions of the Board itself.

A. Territorial Attitudes

The first twenty Africans who lived within the boundaries of what later became the original thirteen States landed at Jamestown, Virginia, in 1619, thus predating by a year the more highly publicized landfall at Plymouth Rock. In early Virginia, as in other colonies, the first Negro settlers were free, and accumulated land, voted, testified in court and mingled with whites on a basis of equality.[3] Unfortunately for them and their progeny, in the 1660's Virginia, Maryland and other states enacted the first of a series of laws which later led to the establishment of slavery on the basis of race, with results which are well known.

Virginia and Virginians played major roles in the early history of Indiana. At one time Kentucky was merely a county of that Commonwealth, which also claimed all of the lands north and west of the Ohio River, east of the

1. Constitution of the State of Indiana, 1851, Art. 8, § 1.

2. Ratcliff v. Dick Johnson School Twp., 1933, 204 Ind. 525, 185 N. E. 143; Greathouse v. Board of School Com'rs, 1926, 198 Ind. 95, 151 N. E. 411; Ehle v. State ex rel. Wissler, 1922, 191 Ind. 502, 133 N. E. 748; School Town of Windfall City v. Somerville, 1914, 181 Ind. 463, 104 N. E. 859; Jordan v. Logansport, 1912, 178 Ind. 629, 99 N. E. 1060; State ex rel. Warren v. Ogan, 1902, 159 Ind. 119, 63 N. E. 227; Freel v. School City of Crawfordsville, 1895, 142 Ind. 27, 41 N. E. 312.

3. L. Bennett, Jr., Before the Mayflower, 29-36 (3rd Ed. 1966).

Mississippi and south of Canada. Many of the earliest white settlers of Indiana were Virginians and they, together with persons of similar background from Kentucky and the Carolinas, all States where slavery was practiced, made up the majority. When Virginia ceded the Northwest Territory in 1784, it was pursuant to a reservation of land to be donated to General George Rogers Clark and members of his Virginia regiment for services rendered in the Revolutionary War.[4] and such grants were made—many for tracts in Indiana. The first territorial governor of the Indiana Territory, following its establishment in 1800, was William Henry Harrison, another Virginian. The son of an influential Virginia planter, he could scarcely have avoided the culture of the southern country gentleman.[5]

The ractial attitudes of Harrison and the early settlers of the Territory (which also included, among other land, all of present day Illinois) quickly became apparent. Although Article 6 of the Ordinance of 1787, providing for the government of the Northwest Territory, prohibited slavery and involuntary servitude in the Territory,[6] which provision was carried forward to the Indiana Territory,[7] they set about immediately to secure the repeal or suspension of Article 6.[8] When the Congress failed to act favorably upon their repeated requests, Harrison and the territorial judges, acting in their legislative capacity, went so far as to adopt a law in 1803 providing that Negroes and mulattoes brought into the territory must perform the service due their masters and that contracts between master and servant were assignable.[9] Another such law provided that slaves purchased outside Indiana and brought within the territory had the Hobson's choice of agreeing to being bound to service or of being taken out of the territory (pre-

4. Act of Viriginia, December 20, 1783. 1 Burns Ind. Stat. Ann. 369 (1955 Repl.).

5. J. Barnhart & D. Riker, Indiana to 1816, at 315 (1971) (hereinafter "Barnhart & Riker").

6. 1 Burns Ind. Stat. Ann. 376 (1955 Repl.).

7. Act of May 7, 1800. 1 Burns Ind. Stat. Ann. 380 (1955 Repl.).

8. See generally Barnhart & Riker, 334-335, 347-354.

9. Philbrick (ed.), Laws of Indiana Territory, 1801-1809, at 42-46.

sumably for resale).[10] Some Negroes were bound to service under indentures for as long as ninety-nine years.[11]

B. Statehood: General Policies

Statehood brought no immediate change. Although slavery was once again prohibited, it is noteworthy that of 1,326 Negroes counted in the 1820 census, 503 were candidly listed as slaves.[12] Discrimination became the official policy of the State, as evidenced by the successive Constitutions of 1816 and 1851, and by the laws enacted by the General Assembly. For example, both Constitutions limited the right to vote[13] and to serve in the militia[14] to white males; these restrictions were not removed until the adoption of constitutional amendments in 1881 and 1936, respectively. A statute of 1818, similar to one enacted during the territorial period, declared that no person with a fourth or more of Negro blood could give testimony in court in a case involving a white party.[15]

Intermarriage between whites and persons of Negro blood was likewise prohibited in 1818.[16] Subsequently, the Act was clarified so as to extend the prohibition to a person having one-eighth part or more of Negro blood, and made violation a felony punishable by a fine and imprisonment for from one to ten years. Such statute, as it existed in 1871, was unanimously held constitutional by the Supreme Court of Indiana,[17] notwithstanding the adoption in 1868 of the Fourteenth Amendment to the Federal Constitution. The last reenactment of such law[18] was not repealed until 1965. Similarly, an 1852 act[19] declared such marriages to

10. *Ibid.*, 136-139.

11. E. Thornbrough, Since Emancipation, 1 (1963) (hereinafter "Thornbrough").

12. W. Heiss (ed.), 1820 Federal Census For Indiana (1966).

13. Constitution of 1816, Art. 6 § 1; Constitution of 1851, Art. 2 § 2.

14. Constitution of 1816, Art. 7 § 1; Constitution of 1851, Art. 12 § 1.

15. Acts 1818, Ch. 3, § 52, p. 39.

16. Acts 1818, Ch. 5, § 59, p. 94.

17. State v. Gibson, 1871, 36 Ind. 389.

18. Acts 1905, Ch. 169, §§ 638, 639, p. 584.

19. 1 R. S. 1852, Ch. 67, § 2, p. 361.

be void, thus creating obvious limitations on the right of inheritance and other legal benefits upon the death of a spouse.[20] This law, too, was not repealed until 1965.

The most striking evidence of the hostility of the white majority was shown in efforts to exclude Negroes from the state and to persuade those already in the state to leave. A law of 1831, which was seldom enforced, required Negoes coming into the state to post bond as a guarantee against becoming a public charge and as a pledge of good behavior. More drastic was Article 13 of the Constitution of 1851 which flatly prohibited Negroes and mulattoes from coming into the state and which provided for penalties for persons who encouraged them to come. Closely linked to the exclusion movement was the colonization movement, which sought to preserve the soil of Indiana for white men by sending Negro residents to Africa. A state colonization society, affiliated with the American Colonization Society, had been organized in 1829 but had never accomplished much. Article 13 of the Constitution of 1851 contained a section encouraging colonization. For several years the state legislature appropriated money for a colonization fund and paid the salary of a State Agent who was supposed to encourage Negroes to emigrate to Africa.[21] Article 13 was held to be null and void in 1866.[22]

In 1885, the General Assembly passed a civil rights law providing that all persons within the jurisdiction of the State were entitled to full and equal enjoyment of the accommodations of "inns, restaurants, eating-houses, barber shops, public conveyances on land and water, theaters, and all other places of public accommodation and amusement;" such law also prohibited discrimination because of

20. As recently as 1940 the 1852 Act was raised in defense of a claim for death benefits under the Indiana Workmen's Compensation Act, the contention being that the widow, a Negro, could not have been married to the decedent because he was white. The Appellate Court held the defense good as a matter of law, if proved, but affirmed the Industrial Board's award to the widow on the interesting ground that the decedent, a Mexican, had not been proved to be "white." Inland Steel Co. v. Barcena, 1942, 110 Ind. App. 551, 39 N. E. 2d 800.

21. Thornbrough, p. 2.

22. Smith v. Moody, et al., 1866, 26 Ind. 299.

race or color in the selection of jurors.[23] It is common knowledge that until the past decade, many parts of this law were more honored in their breach than in their observance, particularly as to the first four categories, often with an assist from the judicial arm of the State.[24] Negroes were rarely admitted, save on a segregated basis, to theatres,[25] public parks, and the like, including State parks operated by the Indiana Department of Conservation, until after World War II. They were confined to segregated wards in public hospitals supported by tax funds, and as we shall see, largely attended segregated schools.[26]

C. Housing Policy

Before turning attention to the schools, however, another area of segregation needs mention, and that is in the matter of housing. Just as was the case in Virginia, so in Indianapolis persons of African descent were present from the beginning. It has been recorded that on the very mission which resulted in the location of the new state capitol on the banks of Fall Creek, Governor Jennings was accompanied by a Negro boy known to history only as Bill.[27] More to the point, Ephriam Ensaw, a freed man who worked for wages, settled in the new town, along with various white settlers, even before the surveyors had finished stak-

23. Acts 1885, Ch. 47, p. 76.

24. See, for example, the ingenuous decision in Chochos, et al., v. Burden, et al., 1920, 74 Ind. App. 242, 128 N. E. 696, wherein two Negro women refused service in a Greek candy kitchen selling ice cream, soda water, etc., for consumption on the premises had their judgments for nominal damages reversed on the ground that such an establishment did not constitute an "eating-house."

25. In 1932, when an Indianapolis movie house opened its doors free to Butler University students in celebration of a football victory, Negro students were barred. Thornbrough, p. 88. (Presumably, however, the celebrants all marched to the tune of *Butler Will Shine Tonight*, the school cheer song written, when a student, by Noble Sissle, an Indianapolis Negro. Sissle went on to national fame as a musician, composer, orchestra leader, and writer/producer of successful Broadway musicals.)

26. For an extended discussion of these and similar examples of State imposed or tolerated segregation, see Thornbrough, pp. 86-93.

27. Leary, Indianapolis The Story of a City (1970), p. 8 (hereinafter "Leary").

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ing the lots.[28] However, by the time the first German and Irish immigrants had been imported in 1836 to work on the Central Canal, most Negroes were to be found in "Colored Town," on the outskirts of the mile square,[29] and were later concentrated in the area around Indiana Avenue.

Segregation in the housing of Negroes in Indianapolis has persisted at least until the date of the filing of this action.[30] As the evidence in this case discloses without conflict, Negroes were discouraged from purchasing homes in predominantly "white" neighborhoods by various methods: white realtors refused to show homes to Negroes (and no Negro real estate broker was permitted to become a member of the Indianapolis Real Estate Association until 1962), a two-price system was used; a realistic market price to whites and a ridiculously inflated price to Negroes, lending institutions refused to finance homes sought to be purchased by Negroes in "white" areas. Those pioneering Negroes who nevertheless overcame all obstacles and succeeded in purchasing such a home were then harassed by such devices as threatening and obscene telephone calls, stones hurled through windows, neighborhood ostracism, etc.[31] Certain streets and other landmarks, such as Fall Creek, White River, certain railroad tracks, etc., were regulated at different times as barriers to be hurdled by Negroes at their peril.

In addition to pressures of the foregoing type, applied by individual whites, residential segregation was also enforced by law, in many instances. Perhaps the best known method was by means of the racial covenant which, when inserted into a deed or plat of a real estate subdivision,

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28. *Ibid.*, p. 13.

29. *Ibid.*, p. 50.

30. The Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 81, 42 U. S. C. §§ 3601 et seq. was not fully effective until December 31, 1969, and its effects have barely begun to be felt.

31. One who received such treatment was Mr. Grant Hawkins, a graduate of Indiana University, successful businessman, and first Negro member of the School Board. For a more detailed discussion, see Thornbrough, pp. 22-29.

limited ownership of the lot to persons of the white race. As may be noted from a cursory observation of plats recorded in the plat books kept in the office of the recorder of Marion County, many of the better known subdivisions, such as Williams Creek Estates, Broadmoor Estates, Meridian Hills, Highwoods Addition, Forest Hills, Wellington Estates, Fall Creek Highlands, Greenslopes, Wynedale, Ellenberger Plaza, and Meridian-Kessler Terrace, contained such covenants, which were routinely enforced until held unconstitutional in 1948.[32]

As shown by the evidence herein, the City of Indianapolis took official action to enforce segregation in 1926 when the City Council, with only one dissenting vote,[33] adopted General Ordinance No. 15, making it unlawful for any Negro "to establish a home-residence on any property located in a white community or portion of the municipality inhabited principally by white people * * *," or for a white person to commit the same act in a Negro community. The ordinance imposed a fine and imprisonment for violation, and further provided that each seven days maintenance of such a residence would be deemed a separate offense.[34] Passage of the ordinance was noted by The Indianapolis News, then and now one of Indiana's leading newspapers, which stated that "Sincere convictions are represented in the ordinance * * *" and "Patience and forbearance are called for."[35] When the Marion Circuit Court held the ordinance unconstitutional a short time later. The Indianapolis News had a plan of action. "One thing should be done as soon as possible," it editorialized, "and that is to pave the streets in colored neighborhoods, and make them so attractive that there will be no desire to get out of them * * *. The sur-

32. The plats of Kessler Park and Crippin's River Park Addition were recorded with racial covenants in 1949, after they had already been held unconstitutional by the Supreme Court in Hurd v. Hodge, 1948, 334 U. S. 24, 68 S. Ct. 847, 92 L. Ed. 1187.

33. The Honorable Edward B. Raub voted in the negative.

34. The Mayor and most members of the City Council of this period (not including Raub) had been elected with the support of the Ku Klux Klan. For a short summary of the Klan era see Leary, Ch. 23.

35. The Indianapolis News, editorial, March 16, 1926.

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roundings should be made as good as those in white sections, so that there may be no reason for leaving them."[36] As recently as July 4, 1963, the major Indianapolis newspapers, in their real estate want ad columns, used the designation "for colored," or "col." in describing residential property in certain sections of the city.

It is common knowledge that in many small towns and a few larger ones in Indiana the custom that Negroes were not allowed to stay overnight was so invoidable that it had the force of law and was actually enforced by local officials.[37] Thus today it is noticeable that almost no Negroes are to be found in communities adjoining the School City of Indianapolis. Marion County has three municipalities other than Indianapolis, all contiguous to the School City. Beech Grove, an industrial community of 13,432, has a Negro population of 19. Speedway City, a similar type community, has 68 Negroes out of a total population of 14,951, while Lawrence has 216 Negroes out of a total population of 18,997. Of Marion County's 792,299 residents, 134,474 or 17% are Negro. Of these, approximately 122,086, or 98.5% are confined to the central area served by the defendant School Board.[38]

The Bureau of the Census recognizes approximately 250 standard metropolitan statistical areas in the 1970 census.[39] Such an area is a county or group of contiguous counties which contains at least one city of 50,000 or more inhabitants and which according to certain criteria, are socially and economically integrated with the central city. The Indianapolis Metropolitan Statistical Area has 1,109,882 inhabitants and includes, in addition to Marion County, the contiguous counties of Boone, Hamilton, Hancock, Hendricks, Johnson, Morgan, and Shelby. The 1970 census figures reflect a total of 2,849 Negroes out of a total population of 317,583 residing in these seven suburban counties, a percentage of 0.897.

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36. *Ibid.*, November 24, 1926.

37. Thornbrough, p. 21.

38. All statistics are based upon the 1970 census.

39. Bureau of the Budget, Standard Metropolitan Statistical Areas (1967, as supplemented).

D. School Policies to 1949

In early Indiana, as has been seen, the Negro lacked many of the rights which are the ordinary attributes of citizenship. The plain fact is that, although entitled to certain rights under Indiana law, such as the right to own property and the right to personal liberty, Negroes were not considered to be citizens of the State until the adoption of the Fourteenth Amendment to the Constitution of the United States.[40] For this reason, many of the rights conferred upon citizens by the successive Indiana Constitutions were construed as not applying to Negroes.

Thus in any early case it was held that Negro children could not attend school with white children over the protest of a white parent, even if they paid their own tuition.[41] A statute in force in 1861 barred Negroes, mulattoes and the children of mulattoes from admission to the common schools.[42] After the adoption of the Fourteenth Amendment, the General Assembly in 1869 enacted a law providing, for the first time, for the education of Negro children, but providing also for them to be organized into separate schools. The statute provided that if there were not a sufficient number of such children within attending distance to form a school in one district, several districts could be consolidated; and if there were not enough to be consolidated within a reasonable distance, "the trustee • • • shall provide such other means of education for said children as shall use their proportion, according to members, of school revenue to the best advantage."[43]

The case of Cory et al. v. Carter[44] was commenced by Carter, a Negro parent of school age children, against the school officials of Lawrence Township, Marion County, to compel them to accept his children as pupils in the "white" district school, such officials having failed to provide any school in that or any adjoining district near enough for his

40. Cory, et al. v. Carter, 1874, 48 Ind. 327.
41. Lewis v. Henley, et al., 1850, 2 Ind. 332.
42. Draper, Trustee, et al. v. Cambridge, 1863, 20 Ind. 268.
43. Acts 1869, Ch. 16, § 3, p. 41.
44. Note 40, *supra*.

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children to attend, whereby they were denied the right to attend any school at all. He secured an order of mandate from the Marion Superior Court, but the Supreme Court reversed, holding that under the 1869 Act Negro children were not entitled to admission in common schools provided for the education of white students. This holding was reaffirmed in subsequent cases.[45]

In about 1868 Indianapolis erected a new school house and, anticipating the 1869 legislation, assigned the old building on Market Street for the education of Negro children.[46] A separate elementary school was opened there in the fall of 1869. Thus at the very inception of public education for the Indianapolis Negro child, he was segregated by virtue of State law. As will be demonstrated later, *de jure* segregation in the elementary schools continued virtually without change until this action was filed, one hundred years later. The situation with respect to high schools has taken a more erratic course.

Indianapolis' first high school was Shortridge, followed by Emmerich Manual Training and Arsenal Technical. For more than fifty years no separate high school for Negro students was established, and after 1877 school children of both races were permitted to select the high school of their choice, attending on an integrated basis.[47] However, with impetus provided by a petition from the Indianapolis Chamber of Commerce, the School Board on December 22, 1922, adopted a resolution authorizing the construction of a "Colored High School." When such school, Crispus Attucks, was opened in September, 1927, all Negro high school students were forthwith compelled to attend it, regardless of their place of residence in the city. In 1935, Ch. 16 of the Acts of 1869 was further amended to require the Board to provide transportation for Negro students required to

45. Greathouse v. Board of School Com'rs, 1926, 198 Ind. 95, 151 N. E. 411; State ex rel. Mitchell v. Gray, et al., School Trustees, 1883, 93 Ind. 303; State ex rel. Oliver, et al. v. Grubb, Trustee, 1882, 85 Ind. 213.

46. Leary, p. 118.

47. Acts 1877, Ch. 81, § 1, p. 124, had amended Ch. 16 of the Acts of 1869 to require admission of Negro students to white schools, if no separate school of comparable grade was provided for Negroes.

travel more than a certain distance by reason of its segregation policies.[48] Thus was instituted the policy of tax-paid transportation of school children (bussing).

Another Act of the 1935 General Assembly is instructive. A law enacted in 1907 had directed township trustees to abandon all schools under their charge at which the average daily attendance had been twelve or fewer pupils. The 1935 act[49] added the following proviso: "Provided, further, that nothing in this act, or in the act to which it is amendatory, shall authorize the discontinuance of any school exclusively for colored pupils where such school is the only school for colored pupils in such school corporation, and any such school heretofore discontinued by the operation of such act shall be re-established." (In sum, trustees were ordered by the State to furnish a separate school building and teacher for the instruction of, for example, one Negro child attending primary school, rather than permit that child to attend a white school).

In 1947, two bills were introduced in the General Assembly, each of which had as its purpose the elimination of segregation based on race, color, creed, etc., in the public school system. In due time, a public hearing was held on one of the bills by the House Committee on Education, at which time the then Superintendent of Schools of defendant Board, pursuant to its authorization, appeared and spoke in opposition. Neither bill passed. However, in 1949 an Act was passed which required desegregation, on a phased basis.[50] Thus ended, at least for a time (see Part VII), the official State policy of segregation.

IV. Board Policies, 1949-1954

As has been shown, the official policy of the State of Indiana and of its agent, the defendant School Board, was one of *de jure* separation of its Negro and white students prior to 1949. During the 1948-49 school year only

48. Acts 1935, Ch. 296, § 1, p. 1457.

49. Acts 1935, Ch. 77, § 1, p. 231.

50. Acts 1949, Ch. 186, p. 603; Burns Ind. Stat. Ann. §§ 28-6106 to 28-6112 (1970), as amended I. C. 1971, 20-4-1-7 to 20-4-1-13.

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614 out of a total of 11,304 Negro students (5.4%) attended regular elementary schools of racially mixed population. The other 10,690 pupils attended sixteen all-Negro elementary schools and all-Negro Crispus Attucks High School. The faculty and staff of each school was completely segregated, and the Superintendent's administrative staff was all white. Generally, Negro schools were built in Negro residential areas and white schools in white areas, and when residential patterns were mixed, Negro and white attendance zones overlapped. Grade structures were altered to achieve segregation in some instances. Negro students in the elementary grades were required to walk, or were transported to all-Negro schools when there were schools, serving only white students, closer to their homes. None of these facts are denied by the defendants.

The 1949 Act which abolished segregation in the public schools, required segregated districts to begin desegregating a grade a year by permitting those students enrolling for the first time in kindergarten, the first elementary grade, and the first junior and senior high school grades to enroll in the school nearest their homes. Accordingly, the Board adopted a policy which, on its face, generally followed the provisions of the statute.[51]

In some instances where desegregation would have resulted if children had been assigned to the closest school, they were assigned to segregated schools farther from their homes. The Board's construction policies during the period 1949-53 minimized the amount of desegregation that occurred. The formerly "colored" elementary schools generally remained all-Negro. Likewise, though specific student assignments were made for all high schools, Crispus Attucks remained all-Negro. With one exception, students attending the all-Negro elementary schools, some of which

51. There were, however, exceptions to this policy. School 19, serving grades 1-6 in 1948-49, did not enroll first grade pupils in 1949-50. Since it was a Negro school in a predominantly white neighborhood, white students in that neighborhood would have been required to enroll in that school under the April, 1949 policy. Negro first graders who would have attended School 19, enrolled at School 64, a nearby all-Negro school, while white students in the School 19 area attended white School 20.

were nearer and more accessible to other high schools, were either assigned exclusively or given an option to attend Attucks; partly as a result of administrative suggestion, the option was usually exercised in favor of Attucks. Further, the transfer policies adopted by the Board facilitated the maintenance of segregated high schools.[52]

At the close of the 1952-53 school year the Board drew fixed boundary lines for all elementary schools.[53] These boundary lines were drawn with knowledge of racial residential patterns and the housing discrimination underlying it. Not only did the Board not attempt to promote desegregation, but the boundary lines tended to cement in the segregated character of the elementary schools. In some instances segregation was promoted by drawing boundary lines which did not follow natural boundaries or were not equidistant between schools.[54] In some instances optional attendance zones between white and Negro schools were adopted in racially integrated neighborhoods. From 1949 to 1953 the high school assignments were maintained in the same segregatory pattern and the creation of the predominantly white Harry E. Wood High School on the Manual High School campus helped perpetuate the segregation of nearby Crispus Attucks.

52. One reason for transfers to be given "special consideration" was if a pupil had an older sibling attending the preferred high school. This operated as a grandfather clause permitting white students to escape Attucks, and remained in effect through March, 1970. Furthermore, proximity per se was not a legitimate reason for transfer, unless a student lived more than two miles from the assigned high school; this prevented Negro students who lived within two miles of Attucks from transferring to other high schools which were closer to their residences.

53. Negro students were, nevertheless, bussed to Negro schools outside their attendance zones from racially mixed areas in at least two cases.

54. For example, the common boundary between Schools 36 (99.3% Negro in 1953-54) and 60 (11.6% Negro) was within one block of School 36 and some eight to ten blocks from School 60. The boundary between Schools 42 (100% Negro) and 44 (1.2% Negro) required Negro students in one area south of School 42 to cross a canal, a parkway, and two railroad tracks to get to School 42; no such impediment stood between this area and School 44. The School 26 (99.8% Negro) common boundary with School 10 (9.7% Negro) required Negro students in the western one to three blocks of the School 26 zone to cross five railroad tracks to get to School 26; no such impediment existed between this area and School 10.

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At the time of the Supreme Court decision in *Brown I* in May, 1954, the situation was as follows: Of the sixteen "colored schools" as of 1949, two were closed, one was converted to an all-white school,[55] one was subsequently considered part of the Crispus Attucks "Junior Division," and the other twelve were 97.5% or more Negro. Of 2,787 Negro high school students, 1,618 attended Crispus Attucks, and faculty desegregation was minimal. The Board thus began the post-*Brown I* era in May, 1954, in substantially the same position that it ended the official segregation era in 1949. The schools were still segregated by operation of law, by virtue of the acts and omissions of the Board done in defiance of the new requirements of Indiana law.

V. Board Policies, 1954-1968

From the date of *Brown I* to the date of this action, the Board continued the student and faculty assignment policies of the previous era without change.

Since 1954, the most notable nonracial characteristic of the school system has been growth. The total number of elementary pupils rose from 53,352 in 1954-55 to 82,853 in 1967-68, while the number of schools rose from 87 regular elementary and junior high schools and eight regular high schools in 1954-55 to 113 regular elementary and junior high schools and eleven regular high schools in 1967-68. This growth caused overcrowding problems in many schools at one time or another, and the Board had available, and employed, various techniques to deal with this overcrowding.

Among these techniques were attendance zone boundary changes, the construction of additions, the construction of new schools, the provision of transportation or the adjustment of existing transportation, alteration in grade structures, and the location or relocation of special education

55. School 19 was converted from an all-Negro nonneighborhood school to an all-white nonneighborhood school in September, 1953. Almost all the Negro pupils who had attended School 19 were assigned to School 64, as School 64's attendance zone was redrawn to include almost all the Negro students in the area. School 19 served, in 1953-54, two noncontiguous white areas and was located in neither of them.

classes in elementary schools. Often these techniques were combined; e. g., in the construction of an addition and a simultaneous boundary change to relieve overcrowding at two contiguous schools.

The defendant Board has constructed numerous additions to schools since 1954; more often than not the capacity thus created has been used to promote segregation. It has built additions at Negro schools and then zoned Negro students into them from predominantly white schools;[56] it has built additions at white schools for white children attending Negro schools; it has generally failed to reduce overcrowding at schools of one race by assigning students to use newly built capacity at schools of the opposite race.[57] The Board has also constructed simultaneous additions at contiguous predominantly white and Negro schools,[58] and has installed portable classrooms at schools of one race with no adjustment of boundaries between it and neighboring schools of the opposite race.

The Board has also constructed additions to large, predominantly Negro elementary schools when desegregation

56. For example, the Board, after hearing complaints about the number of Negroes at School 60, completed the construction of twelve classrooms at School 36 (99.9% Negro) in September, 1959, and zoned some 180 students, predominantly Negro, from School 60 into School 36. Other students, predominantly white, were assigned to School 60 from School 76.

57. In 1954-55 School 37 (100% Negro) was 104 students over capacity; neighboring School 51 (100% white) was 74 students over capacity. An eight room addition was completed at School 37 in February, 1956. No boundary adjustment was made between 37 and 51, however, and overcrowding at 51 persisted so that by 1958-59, it was 121 students over capacity (and only 1.7% Negro). Finally, in September, 1960, a six classroom addition was completed at School 73 and the boundary between School 51 (5.1% Negro) and School 73 (10.7% Negro) was adjusted so that approximately 75 pupils were sent to School 73 from 51.

58. For example, in January, 1957, since classrooms were added to School 64's neighbor, School 21; in August, 1957, six classrooms were added to School 64. In 1956-57 and 1957-58, School 21 was 99.22% and 98.23% white, and School 64 was 99.08% and 99.77% Negro. As another example, Schools 27, 29 and 45 are within six blocks of one another. From 1954 to 1957 each received additions of four to eight rooms. At the time of construction, School 29 was 85.3% Negro, while 27 and 45 were 96.5% and and 95.4% white.

would have resulted from adding classrooms to nearby, smaller predominantly white schools.[59] These large schools have often had inadequate sites.[60] Of the four largest elementary schools in the system, all are more than 90% Negro, and three have had large additions constructed within the last ten years. For example, an eight classroom addition was completed at School 41 in January, 1962, when it was 99.5% Negro, and had a site of 2.7 acres. For the 1970-71 year this school enrolled 1,404 pupils, 99.7% Negro.

An eight classroom addition was completed at School 64 (99.3% Negro) in September, 1962. Nearby Schools 111 (100% white) and 112 (97.9% white) were purchased after annexation and opened that same month. The children from these latter schools in grades 7 and 8 were transported to School 82 even though School 64 was closer to most of these pupils.[61] This continued through the 1965-66 school year. None of these schools other than 64 was more than 4.5% Negro during such years, while 64 was never less than 99.3% Negro. Further, the faculty at School 64 was 96.4% Negro in 1965-66; the faculties at 82, 111 and 112 were all white that same year.

The failure to assign white children to Attucks had important consequences for the Indianapolis elementary schools. Negro students who formerly had been required to attend Attucks regardless of residence were now permitted, in some cases, to attend high schools closer to their homes. Because there was no off-setting assignment of whites to Attucks, through the arrangement of optional zones and nonneighborhood feeder assignments, the At-

59. In April, 1961, a survey of elementary principals was taken by the Board, requesting a "professional opinion" as to maximum, ideal, and minimum school sizes. For a K-S school, the median ideal size designated by the ninety principals returning the questionaire was 600; for a K-6 school, 500.

60. The State Superintendent of Public Instruction has established minimum acreage requirements of seven acres for the first 200 students and one acre for each additional 100 students.

61. The January, 1967, housing facility study noted that School 82 was "quite crowded during those 4 years" that junior high students were transported to 82 from 111 and 112.

tucks enrollment dropped substantially during the 1950's while the predominantly white high schools increased in enrollment.

Attucks thus had available space during this period, and could, and did, accommodate elementary students from overcrowded Negro elementary schools. At various times since 1954 the following schools, none of which have ever been less than 96.5% Negro, have been assigned to the Crispus Attucks campus: 63, 17, 23, 24, 40, and 4. Several hundred of these pupils attended school in the Crispus Attucks building during the 1950's. The assignment of students from these elementary schools to Attucks should be contrasted with the assignment of other students, predominantly white, from nearby elementary schools to Arsenal Technical High School during this same period.

During the post-1954 period, the Board perpetuated segregation through the use of optional attendance zones. Specifically, in areas of racially mixed residential patterns students were given options between predominantly Negro and predominantly white elementary schools, and where entire elementary districts covered both Negro and white neighborhoods, graduates were given options between predominantly Negro and predominantly white high schools.[62] Students in Negro elementary schools were given options to Crispus Attucks when other, predominantly white high schools were closer and more accessible. White students in optional zones almost always attended white schools.

The Board has perpetuated segregation through the construction of new schools. Specifically, new elementary schools to be attended by students of predominantly one race have been constructed adjacent to schools attended

62. School 32 was assigned to Shortridge until September, 1952. At that time, when 32 was 52% Negro, it was given an option to Attucks. By September, 1964, when it was 94% Negro with a 100% Negro faculty, the option was ended and School 32 was assigned solely to Attucks. Similarly, School 44 was assigned to Shortridge until September, 1955, when it was 4.1% Negro. At that time it was given an option to George Washington and Attucks as well as Shortridge. As the percentage of Negroes continued to rise, both the Shortridge and Washington options were dropped and the students were assigned solely to Crispus Attucks.

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primarily by students of the opposite race,[63] new middle schools have been constructed to enroll the students of one race adjacent to schools attended by students of the opposite race,[64] and new high schools have been located and constructed where they have served predominantly white student populations.[65]

The Board has perpetuated segregation by transporting students from overcrowded schools of one race to schools of the same race rather than to available nearby schools of the opposite race. In contrast to the current local and national hullabaloo about bussing, the Board's minutes record no citizen protests to the bussing of white students to white schools.

The Board has also perpetuated segregation in the assignment of special education classes. Specifically, it has maintained predominantly Negro and predominantly white special education departments at contiguous Negro and white schools and has shifted special education classes between schools with a resultant increase in segregation.[66]

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63. In March, 1968, a new School 19 building was completed on a site several blocks from the previous School 19. This school was 96.3% white in 1968-69. Its attendance zone is still not justifiable by neighborhood standards, and its construction insured that School 64 (99.5% Negro in 1968-69) would remain virtually all Negro, as it in fact has. A new School 2 (90.4% white in 1958-59) was completed in October, 1958, containing twenty classrooms, while nearby School 40 was all Negro.

64. Of the various types and sizes of multi-district junior high schools established in the system since 1954, only one has involved the assignment of Negro majority and white majority schools to the same junior high school.

65. The two most recently constructed high schools in the city (John Marshall and Northwest) have been built on the extreme northeastern and northwestern areas of the city, where the Board knew they would serve virtually all-white areas. Both of these schools have in fact reinforced the growing racial isolation of the inner city.

66. An all-Negro special education department was maintained at Attucks while an integrated department was maintained at Wood through most of this period since Wood was established in 1953. All-Negro and all-white departments have coexisted in virtually all-Negro School 64 and neighboring predominantly white School 21 almost continuously since September, 1957. Predominantly Negro special education classes exist on the west side at predominantly Negro Schools 63, 52, and 75, while predominantly white classes are housed at nearby predominantly white Schools 30 and 16.

Special education classes often enroll students from a wider area than the normal attendance zone. Thus they can be shifted between several schools in that wider area to relieve overcrowding where necessary. The Board has shifted these classes in some instances and failed to shift them in other instances, always with a resulting increase in racial segregation.

During the 1960's the Board adopted a "Shortridge plan" to prevent Shortridge High School from becoming an all-Negro school. This plan had the immediate effect of reducing the number of Negro students in Shortridge, many of whom subsequently attended Attucks. No steps were taken prior to the filing of this suit, however, to desegregate Crispus Attucks, and an addition to Attucks in 1966 coupled with the effect of the Shortridge plan insured the continuation of segregation at Attucks.[67]

Some of the Board's 1954-1968 segregation practices are evident in simple boundary changes. For example, in 1962-63, School 69 was 57.95% Negro and School 11, its northern neighbor, was 100% white. A housing facility study in February, 1963, noted that, with respect to School 69:

> "Census figures for the district indicate a slight decrease during the next five years. The nature of the district is changing considerably, which may cause a further increase; however, serious overcrowding is not anticipated in this district in the next five years."

Despite this assessment, the School 69-School 11 boundary was altered three months later and an all-white area in the School 69 district north of 38th Street was transferred to all-white School 11.[68] School 69's Negro percentage immediately rose to 72.9

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67. Because of the small size of the Attucks site (8.4 acres), a waiver had to be secured from the State Board of Education. This waiver was obtained, with the proviso that no more than 2,200 students attend Attucks; nevertheless, in 1967-68 Attucks enrolled 2,394 students, 2,393 Negro and one white.

68. In a letter to parents in this area, an Assistant Superintendent justified the boundary change because of "crowded conditions" at School 69.

According to the evidence, there have been approximately 350 boundary changes in the system since 1954. More than 90% of these promoted segregation.

The results of all of the foregoing policies, coupled with the restrictive housing policies of the entire Metropolitan Area, are clear: since 1954 the percentage of Negro students in the system has increased from 20 to 36, and the segregation has likewise increased. The number of 90% or more Negro schools has risen from thriteen to twenty-five. In 1954-55, 85.9% of the Negro elementary students were in majority Negro schools; in 1968-69, the percentage had risen to 88.2. In 1968-69 Crispus Attucks was 99.8% Negro.[69] Faculty and staff were assigned on a racially segregated basis, meaning that Negro schools had all-Negro, or virtually all-Negro faculties, and vice versa. In short, nothing really changed during the 1954-1968 period, and the Indianapolis school system on the date this suit was filed remained segregated by operation of law.

VI. Board Policies Since May 31, 1968

In May, 1968, after the Board received notification of the plaintiff's intention to file suit if deficiencies were not corrected,[70] it contracted with Indiana University to study elementary school boundaries "for the purpose of determining the best method of achieving maximum desegregation of all schools * * * under the neighborhood concept."[71] A "Special Study Committee" of independent consultants was formed, which issued its report in April, 1969, making no recommendations for the promotion of integration through boundary changes. The activities of this Committee may best be characterized as farcical, since according to the testimony of one of its members, it was

69. The first white attended that school in 1967-68, when one white student was enrolled.

70. This was a "notice letter" under Title IV of the Civil Rights Act of 1964; 42 U. S. C. § 2000c-6.

71. The so-called "neighborhood concept" was not adopted as a formal policy until 1965 and, as has been demonstrated, has proved meaningless in practice. Its principal use is as a slogan for those opposed to bussing across racial lines.

not furnished with data as to the racial composition of the students or faculty at any school.

In February, 1969, the Board requested a study of, and recommendations for, the desegregation of the Indianapolis schools in a letter to the Office of Education, United States Department of Health, Education and Welfare (hereinafter "HEW"). A team of six educators from HEW visited the system for four days in March, 1969, and prepared a series of recommendations for both the elementary and high schools in the system.[72] These recommendations were presented to the Board on April 18, 1969. On June 17, 1969, the Board rejected the HEW recommendations, finding that they were not a "satisfactory or workable solution to the integration problem of the schools."[73]

In the same statement rejecting the HEW recommendations, the Board called for the appointment of a community-based committee to recommend programs to improve integration, with the first priority directed toward secondary schools.[74] The committee was formed and in October, 1969, filed majority and minority reports. The majority recommended the construction of a new Crispus Attucks (presumably, although not explicitly stated, racially desegregated) and also recommended free transfers for high school students regardless of assignment.[75]

72. Mr. Johnson, the leader of this team, testified that he recognized that time was too limited to draw a comprehensive plan; therefore, the recommendations of the team were threefold: (a) to study the possibility of grade reorganization to desegregate the system; (b) the submission of a series of specific reorganizations for specific schools to be implemented by September, 1969, as examples of methods of desegregation and as an act of good faith by the Board; and (c) general recommendations for the amelioration of segregation at Crispus Attucks.

73. However, a study of the feasibility of the HEW recommendations undertaken by the Board had concluded that, with respect to the elementary schools, all were feasible except for an alternate plan to desegregate School 64 and the plan to desegregate Schools 43 and 66.

74. Specifically, the committee was to recommend solutions to "the problem presented by Crispus Attucks High School as it now exists."

75. The minority recommended enrichment of the educational program at Attucks and free choice in high school student assignment. The committee submitted no further reports, and did not consider elementary school desegregation.

Soon after this report, the Superintendent established a staff committee to treat the problem of the desegregation of Attucks. This committee recommended the construction of a new Attucks and the phase-out of the present Shortridge and Attucks. The Board ultimately rejected the proposed phase-out of Shortridge, but directed the Superintendent to search for a site for the new Attucks; no new site has been found.

During the 1970-71 school year, ninth graders assigned to Attucks under a revised feeder system (which desegregated this ninth grade class) attended school at Northwest High School and the Tudor Hall School.[76] Because no site has been found available for a new Attucks, the defendants plan to assign desegregated freshman and sophomore classes to the present Attucks campus in September, 1971. Grades 11 and 12 will remain virtually all Negro, and if this grade-a-year plan is continued, Attucks will remain partially segregated until September, 1973.

During the 1967-68 school year, the School Board decided to establish a middle school (to be known as the Forest Manor Middle School) housing grades 6, 7, and 8 and serving an area comprising the attendance zones of Schools 1, 71, and 73, each of which elementary schools was then, and is now, severely overcrowded. The building of the Forest Manor Middle School was not begun in 1968, as planned, but the project has been revived, and the School Board is on the point of awarding contracts for the construction of the Forest Manor Middle School. The Board's plans for the utilization of this middle school are being reconsidered, because of plaintiff's objections to its proposed use and location. During the 1970-71 school year the percentage of Negro students at Schools 1, 71 and 73 was 91.4, 92.6, and 69.6, respectively, and the proposed location of the Forest Manor school is in a predominantly Negro residential area. It is apparent that, as matters stand, the proposed school would tend to perpetuate segregation.

76. The Tudor Hall School was purchased by the Board for eventual use as a special education facility. The State Superintendent objected to more than 650 students being housed on that site, so part of the Attucks desegregated freshman class was assigned to Northwest High School.

The Board adopted a majority-to-minority transfer provision on June 30, 1970. For the 1970-71 school year approximately 400 high school and 50 elementary school students transferred under this provision, and at the time of trial 300 students had applied for such transfers for the 1971-72 school year.[77]

Since this suit was filed the Board has provided various school services on a nondiscriminatory basis.[78] Transfer policies have been administered so as not to increase segregation. A black history curriculum has been developed. Efforts have been made to recruit additional Negro faculty members, and Negro professional employees have been promoted to responsible positions in the central administrative office. A resolution adopted December 8, 1970, commits the Board to a program for the integration of administrative staffs (including the coaching staff) in each high school.

In October, 1970, the Board entered into a contract with the Office of Education, HEW, under which the latter provided funds for it to employ "advisory specialists" to prepare desegregation plans and in-service training programs for the Indianapolis system. Two such advisory specialists were employed,[79] and presented four plans to the Board on April 1, 1971. Three of these plans treated only eleven all-black, or virtually all-black schools, while the fourth, and recommended plan desegregated every school in the system. On May 25, 1971, the Board rejected all plans, noting that the trial in this cause was to com-

77. Under this provision, students can transfer from a school in which their race is in a majority to a school in which their race is in a minority. The transfers are contingent, under the terms of the policy, on the availability of space, and no transportation is provided. No transfers are accepted under this provision after school has been in session two weeks in September.

78. Among these have been special and social services, lunch programs, libraries, and a program to combat dropouts.

79. Both of these specialists were already employees of the Indianapolis system: one was a former principal and consultant, while the other was a former teacher and had held an administrative position in the central office.

mence July 12, 1971. It thus appears that the Board, having taken some steps toward rectifying its previous failure to comply with *Brown II*, is unwilling to proceed further unless directed to do so by the Court.

VII. External Problems Facing the Board

Despite the fact that the Board, through the years, has consistently employed policies and practices causing and maintaining racial segregation in the School System under its control, it is only fair to say that various factors not of its own making have contributed to that result.

A. Changes in Racial Characteristics of School City

The racial characteristics of the School City changed significantly during the period 1954 through 1970. The number of Negroes residing in the School City increased rapidly, both absolutely and proportionately to the entire population of the School City. The number of areas of the School City in which significantly large groups of Negroes resided increased similarly. The pattern of the change in the location of black residential areas was one of expansion from the center of the School City toward its boundaries. While the Negro population was increasing within the School City, the white population within the School City was decreasing rapidly, and concurrently, the white population in Marion County outside the School City was increasing rapidly.[80]

In 1960, the population of Center Township (all of which, except a small part in Beech Grove, lies within the School City) was 333,351, of which 243,448 (73%) were white and 84,439 (26.8%) were Negro; in 1970, the population of Center Township had declined to 273,598, of which 166,622 (61.2%) were white and 106,112 (38.8%) were Negro.

In 1960, the population of Marion County excluding Center Township was 364,216, of which 353,659 (97%)

80. As found in Section III-C, *supra*, discrimination against Negroes in the matter of housing, enforced or condoned by the City and State has been a major factor in confining the Negro to a compact, central area.

were white and 10,473 (2.9%) were Negro. In 1970, the population of Marion County excluding Center Township was 518,701, of which 488,538 (94%) were white and 28,342 (5.4%) were Negro. The data also show that, whereas 59% of the white population of Marion County lived outside Center Township in 1960, about 74.5% of that group lived outside Center Township in 1970.

The areas of the School City in which the change in racial composition has been significant in the last ten year period include:

(1) An area bounded, generally, by 38th Street on the north, Arlington Avenue on the east, 21st Street on the south, and Boulevard Place on the west. The eastern part of this area is often referred to as "the Forest Manor area." The change in the racial composition throughout the area is reflected in the changes in the racial composition of several of the elementary schools which serve the area, which changes are shown in the table below:

School No.	Negro Students (Percent of Total) in 1960-61	Negro Students (Percent of Total) in 1970-71
1	0.16	91.4
11	0.0	32.5
51	5.09	78.7
53	0.21	32.6
60	44.55	99.6
66	0.44	86.1
69	31.31	98.5
71	2.92	92.6
73	10.73	69.6
76	53.61	99.0
83	(not open)	41.7
99	0.0	29.3
110	(not open)	98.4

(2) An area bounded on the north by 63rd Street (Broad Ripple Avenue), on the east by the tracks of the Monon Railroad, on the south by 38th Street, and on the west by

the Indianapolis Water Company canal, where similar changes are shown in the table below:

School No.	Negro Students (Percent of Total) in 1960-61	Negro Students (Percent of Total) in 1970-71
55	0.0	8.5
66	0.44	86.1
70	0.0	28.1
84	0.0	2.2
86	12.36	53.5

(3) Scattered areas, in each of which the population shift is reflected by a similar sharp change in the racial composition of elementary school population, which changes are shown in the table below:

School No.	Negro Students (Percent of Total) in 1960-61	Negro Students (Percent of Total) in 1970-71
27	45.20	87.3
38	38.63	91.90
45	28.19	98.00
75	24.82	77.50

At the beginning of the 1970-71 school year, the number of students enrolled in the elementary schools was 79,587, excluding students enrolled in the special education schools. During the 1970-71 school year, that total enrollment was reduced to 77,658; the difference of 1,929 between the October and June enrollment totals is the net result of a departure of 2,122 white students from the elementary schools and an inflow of 193 Negro students to the elementary schools. Of the 110 elementary schools, 13 showed gains, and 81 showed losses, in the number of white students enrolled during the 1970-71 school year.

B. Low-Rent Housing Projects

Low-rent housing projects within the School City have significantly affected the racial composition of the schools. A

project typical of this kind is constructed at the periphery of an established Negro residential area and, for that reason among others, attracts a Negro occupancy, which is eventually reflected in the racial composition of the school that serves the area in which the project is situated.

Such an effect is to be seen in several elementary schools, including: School 67, in which Negroes constituted 4% of the student body in 1968-69 and 30.9% in 1970-71, owing to the opening of Eagle Creek Village at Tibbs Avenue and Cossell Road; School 112, in which Negroes constituted 13.7% of the student body in 1968-69 and 42.9% in 1970-71, owing to the opening of Raymond Villa, at Raymond Avenue and Perkins Street; School 71, in which Negroes constituted 10.8% of the student body in 1965-66 and 92.6% in 1970-71, owing to the opening of Hawthorne Place at 32nd Street and Emerson Avenue; and School 99, in which there were no Negro students in 1968-69 and in which Negroes constituted 33.9% of the student body at the end of the 1970-71 school year, owing to the opening of Beechwood Gardens at 30th Street and Graham Avenue.

Housing projects of the kind just described not only have racial consequences for the schools; each of them tends to represent, as well, a demand for a significant amount of school space. Eagle Creek Village, Raymond Villa, and Beechwood Gardens necessitated additions to Schools 67, 112, and 99, respectively, each of which cost about $1,300,000. Salem Village, at 30th Street and Baltimore Avenue, necessitated the construction of a complete school (School 110), which has served a virtually all-black student body since it was opened in 1966.[81]

C. Noncooperation of Local Officials

Some of the reasons why no new site for Attucks has been acquired are directly attributable to action or inaction on the part of certain agencies of the civil government of

81. The plaintiff United States of America, which of course sponsors federally supported housing projects, has suggested a finding that the locations of six of the ten projects opened in the School City since 1965 have tended to promote integration in those instances. There is insufficient evidence to support such a finding.

the City of Indianapolis. One possible site is a 54 acre, undeveloped tract at the southwest corner of the intersection of 38th Street and White River. Although a part of the land is low, there is more than adequate high ground for buildings, and the low ground is protected by a levee. This tract is owned by the City of Indianapolis, which could presumably make it available to the School City free under Indiana law,[82] or in any event make the transfer for a nominal price.[83] However, the City has declined to consider parting with the 54 acres, on the ground that it is needed for use as a nursery for the Department of Parks and Recreation. The City's sense of priorities strikes the Court as curious.[84]

Another likely site for the new Attucks was determined to be a tract at 30th Street and Guion Road, and the Board acquired an option to purchase the tract. It then filed an application to have the land rezoned for school use, only to have its application denied by The Metropolitan Development Commission of Marion County, which asserts the right to control the use of all land in the county, including that proposed to be dedicated for public purposes.

D. Legislative Action Since 1949

As noted briefly above, the State's long time policy of *de jure* segregation obstensibly ended in 1949 with the passage of Chapter 186 of the Acts of that year.[85] The new policy of the State, as set out in the first section of the Act, was stated to be as follows:

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82. See Acts 1957, Ch. 229, p. 501, as amended; Burns Ind. Stat. Ann. §§ 53-403, 53-404, I. C. 1971, 5-18-1-1, 5-18-1-2.

83. The Court estimates that the cost of a school site in an appropriate location, if purchased on the open market, would run from at least $12,500 to $17,500 per acre.

84. In addition to the fact that use of the White River tract as a nursery does not appear to be its highest and best use, it is also instructive to note that the Department has available for nursery purposes various parts of the 2,650 acre non-reservoir portion of its virtually undeveloped Eagle Creek Park. Note also that approximately half of the 54 acres would meet State per-pupil minimum land requirements (Footnote 60, *supra*), leaving the balance available for planting to trees and shrubs.

85. Note 50, *supra*.

> "It is hereby declared to be the public policy of the State of Indiana to provide, furnish, and make available equal, nonsegregated, nondiscriminatory educational opportunities and facilities for all regardless of race, creed, national origin, color or sex; to provide and furnish public schools and common schools equally open to all and prohibited and denied to none because of race, creed, color, or national origin; to reaffirm the principles of our Bill of Rights, Civil Rights and our Constitution and to provide for the State of Indiana and its citizens a uniform democratic system of common and public school education; and to abolish, eliminate and prohibit segregated and separate schools or school districts on the basis of race, creed or color; and to eliminate and prohibit segregation, separation and discrimination on the basis of race, color or creed in the public kindergartens, common schools, public schools, colleges and universities of the state."

Note that the State completely anticipated and completely adopted the holding in *Brown I* by a full five years. Because of *Brown I,* moreover, it is impossible for the State legally to change its professed policy, because that policy has now assumed the stature of a Constitutional imperative, far above the power of the State to detract therefrom. With these principles in mind, the Court examines certain post-1949 legislation enacted by the General Assembly.

Historically, it was well established by the common law of the State that whenever an incorporated city or town expanded its corporate limits, the school city or town succeeded to the powers and duties of the township trustee with respect to the administration of the public schools. In other words, the boundaries of a school city and of a civil city were coterminous.[86] This rule was recognized in a 1931 Act, pertaining to the defendant School Board, as

86. Board of School Com'rs v. Center Twp., 1896, 143 Ind. 391, 42 N. E. 808; School Twp. of Allen v. School Town of Macy, 1887, 109 Ind. 559, 10 N. E. 578; School Town of Leesburgh v. Plain School Twp., 1877, 86 Ind. 582; State ex rel. Mt. Carmel School Corp. v. Shields, 1877, 56 Ind. 521; Carson v. State, to Use of Town of Hanover, 1867, 27 Ind. 465.

follows: "In each civil city of this State having * * * more than three hundred thousand [300,000] inhabitants there shall be a common school corporation hereinafter called the 'school city' whose duties and powers shall be coextensive with the corporate boundaries of such city. * * *"[87] When such Act was amended in 1955 in order to increase the size of the Board, among other things, such provision remained unchanged.[88]

However, in 1961 the General Assembly crippled this policy by an Act which provided that, with respect only to Marion County, the extension of the boundaries of a civil city by a civil annexation would work only a prima facie extension of the boundaries of the school city, and render such school city extension subject to a separate remonstrance by the losing school corporation.[89] Thus, for the first time, it became possible for the School City of Indianapolis, alone among the major school cities of the State, to have jurisdiction over a lesser territorial area than the corresponding civil city.

Even more grave in import are Chapters 52 and 173 of the Acts of the 1969 General Assembly. Section 3 of Chapter 52 amended Chapter 186 of the Acts of 1961 to abolish the concept that the school and civil cities in counties having a city of the first class[90] would have coterminous boundaries, and limited the School City of Indianapolis to enlarging its territory by one of the two methods authorized in the 1961 Act in addition to automatic prima facie extension on enlargement of the civil city: (1) by agreement with the school corporation losing territory, or (2) by unilateral annexation by the School City of all or part of the territory of another school corporation.[91] Both pro-

87. Acts 1931, Ch. 94, § 1, p. 291; Burns Ind. Stat. Ann. § 28-2301 (1948 Repl.), I. C. 1971, 20-3-11-1.

88. Acts 1955, Ch. 123, § 1, p. 291; Burns Ind. Stat. Ann. § 28-2301 (1968 Cum. Supp.).

89. Acts 1961, Ch. 186, §§ 1, 9, 10; Burns Ind. Stat. Ann. §§ 28-2338, 28-2346, 28-2347 (1968 Cum. Supp.), I. C. 1971, 20-3-14-1, 20-3-14-10.

90. Indianapolis is the only city of the first class in Indiana.

91. Acts 1969, Ch. 52, § 3, p. 57; Burns Ind. Stat. Ann. § 28-2346a (1970 Cum. Supp.), I. C. 1971, 20-3-14-9.

cedures are subject to remonstrance. Further, said Section repealed Section 9 of Chapter 186 of the Acts of 1961 as to all enlargements of the School City claimed to have been made pursuant to civil city annexations and not yet finally effective. I. e., in cases where remonstrances and/or court actions were pending against School City annexations pursuant to Section 9 of the 1961 Act, the annexations were simply canceled by legislative fiat.

Chapter 173[92] is formally titled the "Consolidated First Class Cities and Counties Act," and is hereafter referred to by its more familiar name, "Uni-Gov." This Act purports, in general, to consolidate the civil governments of the former City of Indianapolis and of Marion County into a unified, metropolitan, city government, with certain exceptions,[93] which expanded or consolidated city continues to be known as the City of Indianapolis.

The Uni-Gov Act provides expressly that "any school corporation, all or a part of the territory of which is in the consolidated city or county" shall not be affected by the Act.[94] Thus Uni-Gov leaves the defendant School City exactly where it found it: confined to an area in the central part of the consolidated City of Indianapolis, where it is surrounded by eight township school systems operating independently within the purportedly unified City, and by two additional independent school corporations operated by Beech Grove and Speedway City (hereinafter, in the aggregate, outside school corporations"). For the 1969-70 school year these outside school corporations together had 73,205 students enrolled, of whom 2.62% were Negro, and

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92. Acts 1969, Ch. 173, p. 357; Burns Ind. Stat. Ann. §§ 48-91[illegible]—48-9507 (1970 Cum. Supp.), I. C. 1971, 18-4-1-1 to 18-4-5-4.

93. The cities of Beech Grove and Lawrence ("excluded cities") and the incorporated town of Speedway City ("excluded town") are permitted to carry on as separate municipal corporations within the territory of the consolidated city, but the voters of these communities are entitled to vote for candidates for the offices of mayor and city-county councilman of the consolidated city, was well as for the corresponding officials of their respective excluded city or town.

94. Acts 1969, Ch. 173, § 314, p. 357; Burns Ind. Stat. Ann. § 48-9213 (1970 Cum. Supp.), I. C. 1971, 18-4-3-14.

together employed 3,037 teachers, of whom 15, or 0.49% were Negro.

The outside school corporations compete effectively with the School Board for teachers. Since the filing of this action, some white teachers employed by the Board and requested to transfer to integrated schools have declined transfer and found havens in the outside schools. The outside schools have likewise contributed to the exodus of white students from the School City by accepting them for transfer, on payment of tuition.

Considering the history of segregation of the Negro in Indiana and in Indianapolis, the racial complexion of the outside school corporations and of the adjoining counties in the Indianapolis Metropolitan Area, the ongoing flight to the suburbs by the white population of the School City, and the various other factors above set out, the effect of the 1961 and 1969 Acts of the General Assembly referred to in this section may well have been to retard desegregation and to promote segregation. In other words, under previous Indiana law, which still applies to all cities except Indianapolis, civil annexation would automatically carry school annexation with it, and the chances of successful remonstrance against logical annexation by an expanding municipality, carrying with it the usual municipal services, would be virtually nil. Under the present law, if valid, the ability of the Board to expand its jurisdiction coterminous with the consolidated city, or for that matter to expand it at all, is likewise virtually nil, as a practical matter.

E. The Tipping Factor

The undisputed evidence in this case, agreed to by plaintiff's expert from the Office of Education, is that when the percentage of Negro pupils in a given school approaches 40, more or less, the white exodus becomes accelerated and irreversible. Therefore, resegregation rapidly occurs, and the entire central core of the involved city develops into a virtually all-Ngro city within a city when, as in Indianapolis, the Negro residential area is largely confined to a portion of the central city in the first place.

During the trial, this Court repeatedly attempted to cause the plaintiff United States of America to produce statistics from HEW showing comparative racial statistics for the school systems of the larger school cities of the nation before and after active desegregation efforts were commenced. The Court was advised that no such statistics were available, incomprehensible as that might seem considering that such Department is the Federal agency directly concerned with the problem.

However, according to HEW's news release of June 18, 1971, in evidence, the percentage of Negro students in certain public school systems as of fall, 1970 was as follows (in order according to total pupils in system): New York 34.5; Chicago 54.8; Detroit 63.8; Philadelphia 60.5; Houston 35.6; Baltimore City, Maryland 67.1; Cleveland 57.6; Washington, D. C. 94.6; Memphis 51.5; St. Louis 65.6; Orleans Parish (New Orleans), Louisiana 69.5; Atlanta 68.7; Birmingham 54.6; Caddo Parish (Shreveport), Louisiana 49.0; Louisville 48.3; Richmond, Virginia 64.2; Gary 64.7; and Compton, California 82.0. In some of these cities an additional sizable percentage of the student population belongs to another minority group which historically has been, and still is subject to racial discrimination: those with Spanish surnames, presumably of Mexican or Puerto Rican descent. When these percentages are added, the total minority race percentage of pupils in such cities is as follows: New York 60.2; Chicago 64.6; Houston 50.0; and Compton, California 94.4. All of these school cities, as well as others which could be named,[95] appear to be completely beyond hope of meaningful desegregation, absent some dramatic change in their boundaries. In the absence of HEW statistics to the contrary, the Court infers that desegregation efforts have had much to do with the current figures as above quoted.

The brutal truth as to what may happen when a court and a school board undertake in good faith to apply across-the-board desegregation in situations when racial balances reach the tipping point is well illustrated in the rather poignant opinion of the United States District Court for

95. Strangely, the HEW release failed to list Newark, New Jersey, where the combined minority percentage is known to be at least 70.

the Northern District of Georgia, Atlanta Division, Calhoun et al. v. Cook et al., 332 F.Supp. 804, handed down on July 28, 1971. Pointing out that Atlanta in 1961-62 was one of the first major southern cities officially abandoning the dual school system, it noted that in the ten year interim the balance has shifted from 70%-30% white to 70%-30% Negro, and that the remaining 30% whites were themselves confined to two areas. The court declined to order further enforced measures, as being futile.

VIII. Conclusions of Law

1. This Court has jurisdiction of the parties and the subject matter of this action under Section 407 of the Civil Rights Act of 1964 (42 U.S.C. § 2000c-6) and under 28 U.S.C. § 1345.

2. Pursuant to the Fourteenth Amendment and Title IV of the Civil Rights Act of 1964 this Court has jurisdiction to hear and to decide all issues concerning alleged racial discrimination in public education in the Indianapolis School System, including the defendant Board's policies with respect to assignment and transfer of students, the allocation of faculty and staff, the location and construction of schools, the transportation of students, and the general educational structure and process. United States v. School District 151, N.D. Ill., 1968, 286 F.Supp. 786, aff'd 7 Cir., 1968, 404 F.2d 1125.

3. The Court having found for the plaintiff that the defendant School Board was on May 17, 1954, May 31, 1968, and as of the date of trial operating a segregated school system wherein segregation was imposed and enforced by operation of law, the law is with the plaintiff. Therefore, the Board is "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination (will) be eliminated root and branch." Brown v. Board of Education (*Brown II*), 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083; Green v. County School Board, 1968, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716.

4. All provisions of federal, state or local law re-

quiring or permitting racial discrimination in public education must yield to the principle that such discrimination is unconstitutional; revisions of local laws and regulations and revision of school districts may be necessary to solve the problem. *Brown II.*

5. This Court has continuing jurisdiction to make and enforce such decrees in equity as are necessary to accomplish the above mentioned objective. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies. Swann v. Charlotte-Mecklenburg Bd. of Ed. ("*Swann*"), 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554.

IX. Further Parties and Proceedings

As noted herein, the percentage of Negro elementary pupils within the School City had reached 37.4 as of the past school year, and was slowly rising. Fortunately, the change has not yet become a rout, and the Court recognizes that a substantial part of the increase during the past fifteen years has been caused by immigration from the Southern States, which has virtually ceased. The Court is further of the opinion that the white citizens of this community are less likely than those of certain of the cities listed in part VII hereof to succumb to the enslavement of unreasoning racial fears, and recognizes that there are many good reasons for moving to the suburbs which have nothing to do with this case.

Nevertheless, it is obvious that something more than a routine, computerized approach to the problem of desegregation is required of this Court, lest the tipping point be reached and passed beyond retrieve.[96] This is particularly true in the light of the dictum in *Swann* to the effect that "neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the

96. The plight of the Negro citizen, still striving for equality 352 years after Jamestown, recalls the familiar words of the Red Queen to Alice: "Now here, you see, it takes all the running you can do, to keep in the same place. If you want to get somewhere else, you must run at least twice as fast as that!" L. Carroll, Through the Looking-Glass.

racial composition of students bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." Put another way, the easy way out for this Court and for the Board would be to order a massive "fruit basket" scrambling of students within the School City during the coming school year, to achieve exact racial balancing, and then to go on to other things. The power to do so is undoubted. There is just one thing wrong with this simplistic solution: in the long haul, it won't work.

With due regard for the opinions of the many other courts which have grapled with the problems here involved, and with full knowledge of the countless hours of research, heartache, and soul searching which have doubtless gone into them, this Court is compelled to say that the common characteristic of most of them is tunnel vision. In interpreting the mandate of *Green* "to come forward with a plan that promises realistically to work, and promises realistically to work *now*," they have tended to stress the same word stressed by the Supreme Court, and in doing so have focused exclusively on the school board defendant. If the school system involved is already at or near the tipping point, nothing is accomplished save the unfortunate results noted above in various of our major cities. As to the *Green* command, this Court prefers to stress its major thrust: promises realistically to *work*. (This Court's emphasis.)

Realistically, it is clear that the tipping point/resegregation problem would pale into insignificance if the Board's jurisdiction were coterminous with that of Uni-Gov. It would be minimized still further if extended to Lawrence, Beech Grove and Speedway City, and to certain parts of the adjoining counties practically indistiguishable from the City of Indianapolis, such as the Carmel area of Hamilton County and the Greenwood area of Johnson County. Certain legal questions immediately spring to mind which cannot, or at least should not be answered without the joinder of additional parties to this action.

Some of these questions are as follows:

1. Are Chapter 186 of the Acts of 1961, Chapter 52 of the Acts of 1969, and Chapter 173 of the Acts of 1969, or any

of them, unconstitutional as tending to cause segregation or to inhibit desegregation of the Indianapolis School System?

2. If the answer to Question 1 is in the affirmative, did passage of the Uni-Gov Act automatically extend the boundaries of the School City coterminous with the boundaries of the Civil City, as provided generally by Indiana law?

3. If both of the foregoing questions are answered in the affirmative are Lawrence, Beech Grove, and Speedway City presently under the jurisdiction of the defendant Board, or does Uni-Gov merely have the effect of annexing the eight township school corporations?

4. Regardless of the answer to the first three questions, should the General Assembly, by appropriate legislation, provide for the creation of a metropolitan school district embracing all of Marion County, together with all or some substantial part of the other counties going to comprise the Indianapolis Metropolitan Statistical Area, in order to purge the State of its role in contributing to *de jure* segregation in the Indianapolis School System?[97]

5. If the answer to Question 4 is in the affirmative, and the General Assembly fails to act within a reasonable time, or in a reasonalbe way, does this Court have the power to create such a metropolitan school district by judicial decree?[98]

Other questions likewise require an answer:

6. Does the Metropolitan Development Commission of Marion County have the power to deny the School Board its choice of sites for Crispus Attucks or other new schools?

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97. The State has the undoubted power to abolish, consolidate, eliminate, or create new governmental corporations. Woerner v. City of Indianapolis, 1961, 242 Ind. 253, 177 N. E. 2d 34.

98. Is there, for example, an analogy between the power of the Court in desegregation cases, and the power of the Court in cases involving legislative or congressional redistricting, both of which arise out of the equal protection clause of the Fourteenth Amendment? cf. Baker v. Carr, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663; Reynolds v. Sims, 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506.

Put another way, does this Court have the power to override such Commission if it finds that its rulings interfere with desegregation?

7. Does this Court have the power to override rulings of the said Development Commission or of any other involved agencies with regard to the location of low-rent housing projects, if it finds that the locations of such projects interfere with desegregation, or tend to cause resegregation?

The plaintiff is ordered to proceed forthwith to prepare and file appropriate pleadings to secure the joinder herein as parties defendant of the necessary municipal corporations and school corporations which would have an interest in questions 1-5, inclusive, and to seek such relief as to the plaintiff seems justified. The defendant is ordered to proceed similarly as to those agencies which would appear to have an interest in questions 6 and 7, joining them as third party defendants. Because of the interest of the State of Indiana in the constitutionality of its laws, its Attorney General should also be served by the plaintiff.

Nothing herein should be construed as limiting the parties to consideration of the seven questions above suggested. Other questions may well occur to them which would involve additional parties, and if so they should feel free to proceed accordingly and to seek whatever relief seems appropriate.

Further, it may be that the opinions herein expressed, the questions herein propounded, and the orders herein made will cause individuals or bodies politic to desire to intervene herein. Petitions for intervention will be given careful consideration.

X. Order of the Court

Finally, what is to be done pending decision of the questions above set out? The order of the Court in this regard is as follows:

It is hereby ordered that the defendants, their successors in office, officers, agents, employees and all those in active concert or participation with them, are permanently en-

joined from discriminating on the basis of race in the operation of the Indianapolis School System.

It is further ordered that the defendants take, at a minimum, the following specified actions to fulfill their affirmative duty to achieve a nondiscriminatory school system:

(1) Immediately take steps to assign faculty and staff so that no school is racially identifiable from the racial composition of its faculty or staff. Mandatory assignments or reassignments are to be made if necessary, and the assignments to achieve full desegregation will be made prior to or with the opening of schools in September, 1971. This Court further notes that the evidence adduced in this cause shows that, in faculty and staff reassignment heretofore effected, these reassignments have tended to result in more experienced Negro faculty and staff being transferred and/or assigned to schools attended predominantly by white students and more inexperienced white faculty and staff being transferred and/or assigned to schools attended predominantly by Negro students. Defendants should, accordingly, redress or tend to redress this situation in making whatever assignments or reassignments that are necessary to comply with this order.

(2) Immediately continue with their plans to desegregate and relocate Crispus Attucks High School.

(3) Immediately amended the "majority-to-minority" transfer policy to conform to the requirements enunciated by the Supreme Court in *Swann,* so that such transfers are not to be dependent upon availability of space in the receiving school and so that transportation will be provided, upon request, to students making such transfers. Provided, however, that the Board may request authority to designate the transferee school or schools in the event that extreme diffusion of requests presents practical problems of transportation, or in the event that extreme concentration of requests threatens the racial stability of a given school, i.e., the tipping point factor.

(4) Immediately give all possible publicity to students

and parents of students who may be eligible for transfer under (3), regarding the new policy.

(5) Immediately attempt to negotiate with the outside school corporations for possible transfer of minority race students to such outside schools, including high schools, for the coming school year.[99]

(6) Immediately resurvey the probable racial make-up of all schools for the 1971-72 school year, and take appropriate action to prevent schools, including high schools, now having a reasonable white-black ratio from reaching the tipping point. Transportation of students into or out of such schools shall be resorted to as required.[100]

(7) Immediately cease and desist from going forward with construction of the Forest Manor School until the Court hears further evidence on this subject.

It is recognized that the orders thus far made will not result in significant desegregation of majority-black schools immediately, unless the voluntary transfer and outside school corporation transfer policies are unusually successful. It is also recognized that mandatory transfers to maintain stability pursuant to subparagraph (6) may largely involve Negro students, as is certain with regard to transfers to the outside school corporations. Neither of these facts seems "fair" in a theoretical sense, and have caused the Court a great deal of concern. However, there is a limit to what can be accomplished at one time, and final plans cannot be made until answers are found to the seven legal questions posed. Determination of such questions will be expedited to the utmost degree consistent with due process.

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99. If the outside school corporations have the capacity to accept transfer of white students, they have the capacity to accept minority race students. Further, the Board has available many portable classrooms and could, with a little imagination, "lend-lease" teachers, if necessary.

100. This Court regards the outcry made in some quarters against "bussing" as ridiculous, in this age of the automobile. Most students in the outside school corporations have been bussed for years, with never a complaint against bussing per se. Students required to be bussed could be required to walk to their former schools for ease of pick-up and speed in delivery.

Meanwhile, the defendants are directed to file, on or before September 3, 1971, the plans they propose for the 1971-72 school year pursuant to the within order and on their own initiative, with the usual copies to counsel and amicus curiae, who shall have the right to object thereto and/or to make their own suggestions within ten days thereafter. Such plans shall include their current proposals regarding the site of and assignment of pupils to the proposed Forest Manor Middle School.

It is finally considered and adjudged that the defendant School Board pay the costs of this action.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS
for the Seventh Circuit

SEPTEMBER TERM, 1972 SEPTEMBER SESSION, 1972

No. 72-1031
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana.
No. IP 68-C-225
S. HUGH DILLIN,
Judge.

ARGUED SEPTEMBER 13, 1972—DECIDED FEBRUARY 1, 1973

Before KNOCH, *Senior Circuit Judge*, FAIRCHILD and PELL, *Circuit Judges.*

PELL, *Circuit Judge.* This is an appeal from an order[1] by the district court finding that the Board of School Commissioners for the School City of Indianapolis, Indiana ("School City")[2] had been following a course of *de jure* segregation in violation of the holding of the Supreme

1. The district court's Memorandum of Decision is set out in full as *United States* v. *Board of School Commissioners of City of Indianapolis, Indiana*, 332 F. Supp. 655 (S. D. Ind. 1971).

2. The district court noted at 332 F. Supp. at 675-76 that by special act of the Indiana legislature the School City of Indianapolis is no longer coterminous with the civil or corporate city of Indianapolis. We draw no inferences from this fact.

Court in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954) (*Brown I*). On the basis of this finding, the district court determined as a conclusion of law that it had authority to convert to a unitary system.[3] The district court, as trier of fact, made detailed findings of fact to support the ultimate finding of *de jure* segregation and we shall not attempt to recapitulate those findings, except where specifically required. We do note however, that the court specifically found that (1) on May 17, 1954 (the date of the decision in *Brown I*), the School Board was operating a dual school system, that is, it was found to have had a "deliberate policy of segregating minority (Negro) students from majority (white) students," and (2) that the Board had not changed its policies so as to eliminate such *de jure* segregation on or before May 31, 1968 (the date on which the Government filed its complaint), 332 F.Supp. at 658.

Before turning to appellants' contentions, we first enunciate a few general principles on which the opinion of this court is based. In order to support a finding of *de jure* segregation, it is not necessary that there be a complete separation of the races. Certainly school systems totally segregated by force of a state law have been found to violate *Brown I*, but other districts in which segregation has been only partially effective (that is, in which there are some integrated schools) have been held to be equally in violation. *See Davis* v. *School District of City of Pontiac, Inc.*, 309 F. Supp. 734, 740 (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir. 1971); *United States* v. *Board of Education, Independent School District No. 1, Tulsa County, Oklahoma*, 429 F.2d 1253 (10th Cir. 1970). Further, the actions of the Board of School Commissioners and its duly-appointed representatives and agents may be sufficient to constitute *de jure* segregation without being based on a state law, or even if they are in derogation of state

3. The district court ordered interim relief and pursuant to *Brown* v. *Board of Education of Topeka*, 349 U. S. 294 (*Brown II*), retained jurisdiction to order further relief. In its brief, the School City questioned the specific interim relief regarding the Forest Manor Middle School, but that controversy was settled prior to oral argument.

law forbidding segregation.[4] *See Keyes* v. *School District No. 1, Denver, Colorado,* 445 F.2d 990 (10th Cir. 1971), *cert. granted,* 404 U.S. 1036 (1972); *Bradley* v. *Milliken,* ..... F.2d ..... (6th Cir., filed Dec. 8, 1972) (slip op. at p. 49-50).

Another principle which comes into play in examining the district court's opinion relates to the affirmative duty placed on a school board "to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green* v. *County School Board of New Kent County,* 391 U.S. 430, 437-38 (1968). This affirmative duty attaches to any school system guilty of *de jure* segregation at the date it became illegal under *Brown I,* May 17, 1954. Thus, we reject the distinction, proposed in the district court by the *amicus curiae,* between violation (initial, *e.g., Brown I*) cases and remedial (enforcement, *e.g., Brown II*) cases, for a court in a remedial case when it is considering what remedy to order looks to the same factors as it did when it determined that there was a violation of the mandate of *Brown I.* A school board, after years of *de jure* segregation, cannot blithely say that it has become "color blind" the day before a suit is filed and thereby avoid liability. As the Supreme Court recognized in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 18 (1971), not all "invidious racial distinctions" are readily eliminated. It is in this sense clear that factors viewed as being reflective of *de jure* segregation in remedial cases would be similarly significant in the initial determination of whether or not there has been a violation of constitutional rights. It is in this way that the remedial cases are relevant to the present case.

On this appeal, defendants basically present two arguments: first, that the district court erred as a matter of law in basing its finding of *de jure* segregation on the evidence of mere racial imbalance in the schools, and second, that the district court's finding that segregation

4. In 1949, the Indiana General Assembly passed an Act requiring desegregation on a phased basis, ending the official State policy of segregation, Acts 1949, ch. 186, p. 603; Burns Ind. Stat. Ann. §§ 28-6106 to 28-6112 (1970).

resulted from the School Board's actions, and therefore was *de jure,* was clearly erroneous. Although the first point might appear to be subsumed in the second, there is a distinction between the two as the second assumes, *arguendo,* that the district court did not make the mistake claimed in the first point.

Appellants first assert that there is no constitutional duty to remedy the effects of racial imbalance or to maintain any particular racial balance in the public schools. The Government does not quarrel with this assertion, and, indeed, insofar as it relates to purely *de facto* segregation, *unaided by any state action,* it is the law of this circuit, *Bell* v. *School City of Gary, Indiana,* 324 F.2d 209 (7th Cir. 1963), *aff'g* 213 F.Supp. 819 (N.D. Ind. 1963). The Board contends that since no student since *Brown I* has ever been compelled to go to a school because of his race nor denied admission to a school because of race, the racial imbalance presented in the record cannot support a finding of *de jure* segregation. In sum, appellants seek to portray this case as one of *de facto* segregation only, and argue that there is no duty to alleviate such racial imbalance which the Board did not cause. *Deal* v. *Cincinnati Board of Education,* 369 F.2d 55 (6th Cir. 1966); *Bell* v. *School City of Gary, supra.*

The difficulty with this line of reasoning is that it does not comport with the findings of fact of the district court. As Judge Kiley has said for this court,

> "The weakness in this argument is that the district court did not find that defendants inherited an innocent de facto segregation situation, but found that they inherited from their predecessors a discriminatorily segregated school system which defendants subsequently fortified by affirmative and purposeful policies and practices which effectually rendered de jure the formerly extant de facto segregation. . . . This is not a case of mere 'inaction' under the court's finding of the unlawful actions of the Board." *United States* v. *School District 151 of Cook County, Illinois,* 401 F.2d 1125, 1131 (7th Cir. 1968).

The present case—in which, as will be discussed below, the district court found gerrymandering of districts, segregation of faculty, and other indicia of a dual system—stands in marked contrast to the *Deal* and *Bell* cases, above, where the district courts made specific findings of no such discriminatory practices by the boards.[5] Similarly, the present case is unlike *Banks* v. *Muncie Community Schools*, 433 F.2d 292 (7th Cir. 1970), where the court remarked that the record failed to disclose evidence of either racial motivation in board policies or a history of racial segregation from which such motivation might be inferred. Here, the district court commented extensively on both aspects in its opinion.

But appellants point to the language in the Supreme Court's opinion in *Swann, supra*, 402 U.S. at 24-25, which states that a particular racial balance is not necessary in each school and that one-race schools may be acceptable. They extrapolate from this that, since the only evidence before the trial judge was that of racial imbalance, the holding must be clearly erroneous, Rule 52(a), Fed. R. Civ.P. Our review of the record and the district court's opinion convinces us that this contention cannot be sustained. What the district court's opinion relates is a pattern of decision-making which it determined reflected a successful plan for *de jure* segregation. Although it might not be possible to infer the requisite discriminatory intent from any one instance or example in the record, it is clear that the district court found a purposeful pattern of racial discrimination based on the aggregate of many decisions of the Board and its agents. See *Davis* v. *School District of the City of Pontiac, Inc.*, 443 F.2d 573, 576, (6th Cir. 1971).

The appellants deny any conscious motivation on the part of their predecessors or themselves to foster, or even continue, segregation policies in the school system; how-

5. In *Bell*, there was a specific finding that there was no change in the school district boundary lines, and thus no gerrymandering. Also in *Bell* there were examples of black students being transferred from predominantly black schools to predominantly white schools to relieve overcrowding.

ever, in examining that which was in existence at the time of *Brown I* and that which transpired thereafter, the courts are not precluded from drawing the normal inference of intent from consciously consummated acts. Intent, in this sense, may or may not be consistent with expressed motivation.

There is no doubt that the statistics as to the extreme racial imbalance in various schools, especially those schools previously segregated by state law until 1949, was one of the factors which the district judge considered. But even though no particular racial balance is *per se* necessary, *Swann* does not say that such imbalance may not be considered as one factor from which the district court may infer a segregatory intent.

Inasmuch as our review of the district court's order, as discussed hereinafter, reflects that the racial imbalance was only one factor considered by the district court, we reject appellants' first contention that the finding of *de jure* segregation was based merely on evidence of racial imbalance.

The Board also rests its case on the alleged mistake of the district court in inferring *de jure* segregation from various acts which encouraged racial imbalance in the schools. It argues that these underlying findings of fact are clearly erroneous insofar as they place the blame for the present system's racial imbalance on actions taken by the Board and its agents. To show *de jure* segregation, rather than *de facto* segregation, the Government must show improper intent and causation. Throughout the trial and in its brief in this court, the Board emphasized not only its lack of intent, but also that the schools which are predominantly or completely black would have become so no matter what the Board did as long as it maintained some policy approximating that of a neighborhood school system. It is to these contentions that we now turn.

Initially, we must consider appellants' contention that they have adhered nondiscriminatorily to a policy of neighborhood schools. We are, of course, limited by the fact that we can only set aside the district court's findings

if they are clearly erroneous, Rule 52(a), Fed. R. Civ. P., and cannot substitute our "findings" for those of the district court, *Northcross* v. *Board of Education of the Memphis, Tennessee, City Schools*, 397 U.S. 232, 235 (1970), as requested by appellants in oral argument, even though much of the record is documentary.[6] We also note that appellants are most strenuous in their denial of any present discriminatory activity, leaving the actions of the 1950's as little more than ancient history with minimal or no probative value for this case. At this point, we need only note that most of the practices and policies discussed below were present in May of 1954 and that the evidence of both segregatory intent and causation is substantial enough to support the district court's findings. Further, as noted above, the fact that the Board's predecessors were guilty of unlawful segregation after *Brown I* does have an impact on the Board's case today. It placed the Board thereafter under an affirmative duty to eliminate all vestiges of the dual system.

The district court made detailed findings regarding a number of practices which it considered supported the ultimate finding of *de jure* segregation. Perhaps the most extensive finding related to gerrymandering of school attendance zones within the allegedly neutral framework of the neighborhood school system. In the Board's initial set of neighborhood boundary lines, the district court found,

> "[they] were drawn with knowledge of racial residential patterns and the housing discrimination underlying it. Not only did the Board not attempt to promote desegregation, but the boundary lines tended to cement in the segregated character of the elementary schools." 332 F. Supp. at 666.

Our examination of the record shows this finding to be supported by substantial evidence. Most characteristic is the district carved out of School 64 which exactly covers a

6. There were over 190 exhibits introduced into evidence by the parties, many with multiple sub-parts. Yet, it would be inaccurate to say that the documentary evidence was all that was involved since the trial lasted several days, with the transcript covering over 2000 pages if three definitions admitted into evidence are included.

small enclave of blacks on the southeast side of Indianapolis. That it was easy for the Board to superimpose these geographical limitations on the patterns of residential discrimination discussed by the district court does not make the congruency of housing and school boundaries inevitable. It was just such a use of boundary lines to lock in previous segregation which was, condemned in *United States* v. *School District 151, supra,* 404 F.2d at 1132, and *United States* v. *Board of Education, Tulsa County, Okla., supra,* 429 F.2d at 1255 and 1259.

This questionably fortuitous superimposing of boundary lines was highlighted by the district court when it alluded to the inconsistent application of the generally accepted principles for drawing zones for neighborhood schools, thereby increasing racial imbalance, 332 F. Supp. at 666, n.54. Such evidence was considered probative of the existence of a dual school system in *United States* v. *Board of Education, Tulsa County, Okla., supra,* 429 F. 2d at 1256. On the whole, we think that the record is clearly sufficient to support a finding of gerrymandering of school boundary lines. Certainly, we are unable to say that the finding is clearly erroneous. Once again, it is not any one specific change which would allow a court to find such a fact, but the pattern and practice from which the court could infer the impermissible occurrence.[7] *Cf. Downs* v. *Board of Education of Kansas City,* 336 F.2d 988 (10th Cir. 1964). The district court in the present case rejected similar explanations raised by appellants, at least as to some of the changes, and we cannot say that this finding is clearly erroneous on the record before us. We agree with the court in *Keyes* v. *School District No. 1, Denver, Colorado, supra,* 445 F.2d at 999, that "we can perceive no rational explanation why state imposed segregation of the sort condemned in Brown should be distinguished from racial segregation intentionally created and maintained through gerrymandering, building selection and student

7. The most graphic example of such gerrymandering is found in the feeder schools chosen to send students to all-black Crispus Attucks High School in 1954, the year *Brown I* was decided, and continued for years thereafter.

ransfers." See also *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 876 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967).

In support of the finding of a policy of gerrymandering chool boundaries was the use of optional attendance zones liscussed by the district court at 332 F.Supp. at 668. Although the Board asserted a variety of explanations for hese optional zones, there is no doubt that its effect was o allow whites in racially mixed neighborhoods to choose o attend a "white" school and blacks to attend a "black" chool. There was testimony in the record as to informal ractices of encouraging low achievers and problem students who were black to go to all-black Crispus Attucks High School. This practice was identical to one condemned n *Smuck* v. *Hobson*, 408 F.2d 175, 183 (D.C. Cir. 1969), *aff'g Hobson* v. *Hansen*, 269 F. Supp. 401 (D.D.C. 1967). Moreover, since the optional attendance zones in the present ase were superimposed upon a system with a substantial istory of state-enforced segregation, we find particularly pplicable those cases which have questioned freedom-of-hoice plans as a means for eliminating *de jure* segregation.

In *Green* v. *County Board of New Kent County, supra*, nd *Raney* v. *Board of Education of the Gould School District*, 391 U.S. 443 (1968), the Supreme Court, although ot holding freedom-of-choice plans to be unconstitutional *er se*, stressed that they were not always an effective way f desegregating a dual system, and, in fact, might serve nly to perpetuate separation of the races by placing the urden for desegregation on the children and their parents ather than on the school board where it belonged. If we ollow the Supreme Court's mandate in *Monroe* v. *Board of Commissioners of the City of Jackson*, 391 U.S. 450 1968), and look at the effect of the free transfer plan on he school system, then it becomes quite clear that the listrict court's disapproval of these optional attendance ones was not clearly erroneous.

Further reinforcing the district court's opinion was the tipulated fact that "it had been the general policy and ractice of the defendants and their predecessors in office

. . . to assign teachers (including substitute teachers) and staff members to schools, . . . so that, in general, the faculty and staff of each school mirrored the racial composition of the school's student body." Such a practice was condemned by the court in *Davis* v. *School District of the City of Pontiac, Inc., supra,* 443 F.2d at 574 and 576. But more significantly, the practice was impliedly condemned by the Supreme Court in *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 18: "Independent of school assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." The fact that after the Government initiated this suit the Board of School Commissioners by stipulation agreed to eliminate this policy and assign teachers on a nonracial basis under court supervision will be discussed hereinafter. At this point, we only note that as of 1968, substantial faculty segregation (to match the student segregation—whether *de jure* or *de facto*) was the admitted policy of the Indianapolis school system.

The district court also referred to Board practice concerning construction of additions to existing schools and temporary transportation of students when there was overcrowding prior to any permanent resolution of a given situation, 332 F. Supp. at 667-668 and 669. Further, the court noted that the construction of new schools fitted into a pattern of promoting racial imbalance and isolation, 332 F.Supp. at 668-669. Once again, the general finding of fact as to intent made by the district court is a permissible inference from the evidence presented by the record. There were several instances cited in which additions were built to adjoining schools of opposite racial makeup rather than building a new school between them which would have had a racially mixed student body. It was a similar pattern of construction of additions to existing schools on which the court relied in part in finding *de jure* segregation in *United*

States v. *Board of Education, Tulsa County, Okla., supra,* 429 F.2d at 1256. In addition, the placement and usage of junior high schools was stressed by the Government in its case in chief. In those examples, certain intermediate grade pupils were put into junior high schools with the pupils coming from elementary feeder schools basically of one race makeup even though another elementary school not used for feeding, containing basically pupils of the opposite race, was as close to the junior high school and often was more overcrowded than the feeder schools.

With respect to the district court's findings on the Board's choice of sites for new schools, of particular interest is the fact that the two newest high schools have been constructed in the furthest extremities of the School City, as far as possible from the center city black areas. Although the construction of schools to service these rapidly developing areas was indeed necessary, their location at the most distant points of the School City apparently was viewed by the district court as one further fact from which it inferred a segregatory intent, an inference which we cannot say is clearly erroneous on the record as a whole. As this court said in *United States* v. *School District 151, supra,* 404 F.2d at 1133, "it does not follow from the absence of a duty to achieve racial balance that a Board may deliberately select sites to achieve racial segregation." Nor, we will add to the foregoing statement, may a Board deliberately but unnecessarily select sites the obvious result of which is the achievement of racial segregation.

Similarly, the Chief Justice's opinion in *Swann* v. *Charlotte Mechlenburg Board of Education, supra,* 402 U.S. at 20-21, emphasized that construction of new schools was one of the most potent weapons in maintaining a segregated school system, both by constructing new schools in white suburban areas far from black residential areas, thus allowing racial separation without significant departure from the often enunciated principles of "neighborhood schools," and by promoting further residential segregation by denoting specific areas as white or black. See also *United States* v. *Jefferson County Board of Education, supra,* 372 F.2d at 876.

From the above, we conclude that the findings of the district court are not clearly erroneous, that, in fact, the factors cited by the judge to support the ultimate finding are relevant and significant considerations, not only in our opinion, but also in the opinions of various courts which have dealt with similar cases, and that the inference as to the improper intent which the judge drew from the patterns he saw was proper. As to this last point, we can only emphasize that there are very few cases of school segregation today in which the defendants admit that they had an improper intent. Such intent may then be properly inferred from the objective actions. The district court's opinion refers not only to specific examples but also to aggregate findings: for example, the court stated, "according to the evidence, there have been approximately 350 boundary changes in the system since 1954. More than 90% of these promoted segregation." 332 F.Supp. at 670. See *Keyes* v. *School District No. 1, Denver, Colo., supra*, 445 F.2d at 1000. There is substantial evidence to support the inference.[8]

There is one further contention raised by appellants that we must consider. As noted above, appellants denied both that they had a segregatory intent and that their actions were the proximate cause of the present severe racial imbalance in many of the schools in Indianapolis. The Board argued that whatever patterns of *de jure* segregation existed in the past, today's segregation was *de facto*, if that. Therefore, it is argued, nothing the Board could have done would have prevented such a situation from occurring unless it had rejected the concept of neighborhood schools altogether, something which the courts have not required in the absence of *de jure* segregation. This contention is not easily answered since, as the district court's opinion reflects, other forces both public and private have had significant impact on residential housing patterns in Indianapolis.

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8. We note that such inferences are not unique to this area of the law. The doctrine of "conscious parallelism" in antitrust law involves a similar inference of intent from objective factors. See *Antitrust Developments, 1955-1968*, at 22-24. See also *Littleton* v. *Berbling*, No. 71-1395, ... F. 2d . . . . (7th Cir., filed October 6, 1972) (slip op. p. 29).

Arguably, *Brown I* and *Brown II* would still reach such conduct even if the result was clearly inevitable. But we can add that in the present case we believe that the district court's finding is not clearly erroneous when it lays at least a substantial part of the blame on defendants and their predecessors and agents. The Supreme Court in *Swann*, as well as many other courts, has recognized that school policy has a substantial impact on residential patterns as well as vice versa. Thus, the appellants are not the victims of the inevitable since their predecessors' actions have contributed in substantial part to the present pattern. Furthermore, even the appellants cannot successfully argue that the marginal cases in racially mixed areas are inevitable. Those schools which might have racially mixed enrollments today but due to the practices found by the district court are either predominantly white or predominantly black are clearly within the Board's responsibility. Finally, it would be improper to allow the Board to follow policies which constantly promote segregation and then defend on the *presumption* of inevitability.

A related consideration is found in appellants' protestations that they have in the last several years taken substantial steps to correct any possible inequities inherited from their predecessors in office. The district court's opinion shows, however, that even after the date the suit was filed, defendants continued in some of the patterns which the court found to be segregatory. Even giving the appellants the benefit of all doubts as to the last few years, we would agree with the court in *Davis* v. *School District of City of Pontiac, Inc., supra,* 443 F.2d at 575: "However, these same contentions were presented at trial and the District Court, while acknowledging recent efforts to improve the situation, nevertheless found the new policies inadequate to cure the effects of years of purposeful segregation." Especially as to actions taken after the date on which the suit was filed,[9] as praiseworthy as they may be, such actions go more to the proprietary of granting

9. The integration of Crispus Attucks High School, the desegregation of faculty appointments, and the majority to minority transfer program were adopted only after this suit was filed.

equitable relief, rather than to the merits of the district court's findings. We might also note that since 1968, when this suit was filed, the Board has rejected a plan of desegregation propounded at the Board's request by a team of educators from the Office of Education, Department of Health, Education and Welfare. Although there was certainly no requirement that the Board accept the proposal, the unqualified rejection of a similar plan was found to be probative of an improper intent in *United States* v. *School District 151, supra,* 404 F.2d at 1133.

In sum, this case was tried to a judge who obviously gave it considerable conscientious thought and attention and by able counsel on both sides. We have examined the court's findings of fact and are unable to say the findings are clearly erroneous that during much of the period from 1954 to 1968 the Board continued affirmative policies which promoted a dual system, and that last-minute efforts have been totally insufficient to eliminate the consequences of those years of discrimination. Since the district court's findings of fact are not clearly erroneous, and since the court correctly stated the law based on those findings, the judgment of the district court is affirmed.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

The first section of the Fourteenth Amendment to the Constitution of the United States provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 2000c-6(a) and (b) provide:

"(a) Whenever the Attorney General receives a complaint in writing—

(1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or

(2) signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, or national origin,

and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for

such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

"(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legeal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property."

28 U.S.C. § 1345 provides:

"Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress. June 25, 1948, c. 646, 62 Stat. 933."

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1450

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 474 F. 2d 81. The opinion of the district court (Pet. App. A) is reported at 332 F. Supp. 655.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1973. The petition for a writ of certiorari was filed on April 25, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court's findings of unlawful *de jure* racial segregation in the Indianapolis public

schools were properly upheld by the court of appeals as not clearly erroneous.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourteenth Amendment to the Constitution of the United States and of Section 407 of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6, are set forth at Pet. App. C.

STATEMENT

The United States instituted this school desegregation suit in the United States District Court for the Southern District of Indiana pursuant to Section 407 of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6.[1] On August 5, 1968, the district court, on the basis of stipulations agreed to by all parties (Pet. App. B, A55-A56), found unlawful racial discrimination in petitioners' faculty assignments and entered a preliminary injunction ordering them to take specific measures designed to desegregate the public school faculties. After lengthy trial proceedings, the district court (Pet. App. A) further found unlawful racial discrimination in the assignment of students, enjoined further racial discrimination in the operation of the Indianapolis public school system, and ordered petitioners to take specified action "to fulfill their affirmative duty to achieve a nondiscriminatory school

[1]Review in this Court has also been sought with respect to several other aspects of this litigation. See *School Town of Speedway* v. *Dillin*, certiorari denied, 407 U.S. 920; *Citizens of Indianapolis for Quality Schools* v. *United States*, No. 72-710, certiorari denied January 22, 1973; *Metropolitan School District of Lawrence Township* v. *Dillin*, No. 72-1377, petition for a writ of certiorari pending; *Sendak* v. *Dillin*, No. 72-1418, petition for a writ of certiorari pending.

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system" (Pet. App. A, A44).[2] The court of appeals affirmed (Pet. App. B).

The district court set forth at length the reasoning supporting its finding of unlawful school segregation. The court first determined (Pet. App. A, A16-A19) that the petitioners had been implementing a deliberate policy of racial segregation on May 17, 1954, the date of this Court's decision in *Brown* v. *Board of Education,* 347 U.S. 483. Until September 1949, petitioners openly and officially operated a racially segregated dual school system under a state law specifically authorizing such systems (Pet. App. A, A14-A15). The Indianapolis dual school system was characterized by complete racial segregation of students at the high school level and of faculties and staffs for schools of all grade levels, and by substantial segregation of students at lower levels (Pet. App. A, A17). In 1949, the state statute permitting dual school systems was repealed. Following repeal of the authorizing statute, petitioners nevertheless continued to promote and effectuate substantial racial segregation (Pet. App. A, A17-A18). Consequently, in 1954 the Indianapolis schools were "still segregated by operation of law, by virtue of the acts and omissions of the [petitioner School] Board done is defiance of the new requirements of Indiana law" (Pet. App. A, A19).[3] The district court further

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[2]The district court stated that certain further legal questions should be resolved prior to entry of a final desegregation order (Pet. App. A, A40-A43). These issues remain to be litigated in proceedings scheduled to commence in the district court on June 11, 1973.

[3]As of the 1954-1955 school year, each of the 12 elementary schools designated as "colored schools" in 1948 was still more than 97.5 percent black, and the single "colored" high school remained 100 percent black.

found (Pet. App. A, A19-A25) that petitioners, by failing to desegregate the all-black schools existing in 1954 and by discriminatorily contributing to the establishment or maintenance of racial segregation at other schools since 1954, had continued to operate an unconstitutional system of student assignment from 1954 to the date of trial.[4]

The district court's general finding that petitioners had continued unlawful school segregation from before 1949 to the date of trial was based upon separate specific findings with respect to the deliberate fostering of racial segregation through gerrymandered attendance zones (Pet. App. A, A18-A20, A24), student transfer policies and practices (Pet. App. A, A18), the use of optional attendance zones in racially mixed residential areas (Pet. App. A, A17-A18, A21-A22), the pattern of new school construction (Pet. App. A, A22-A23), the bussing of students to maintain segregation (Pet. App. A, A18, A21, A23), the maintenance of segregation in special education classes in elementary schools (Pet. App. A, A23-A24), the use of portable classrooms and other facilities to forestall desegregation (Pet. App. A, A20-A21), and the assignment of faculty according to race (Pet. App. A, A19, A21, A25).

ARGUMENT

Petitioners challenge the district court's finding of unlawful segregation, apparently contending that the school segregation in Indianapolis in 1954 was merely *de facto* and not *de jure* and that the finding of acts and omissions implementing continued segregation after 1954 was clearly erroneous.

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[4]Petitioners conceded that their system of faculty and staff assignment had been segregated during this period. See p. 2, *supra*.

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1. Petitioners' contention that the 1954 school segregation in Indianapolis was merely *de facto* segregation apparently rests primarily on the mistaken premise that only completely segregated dual school systems constituted *de jure* segregation in 1954. In *Brown* v. *Board of Education, supra,* this Court held that state-imposed racial separation in the public schools denies black students equal protection of the laws. This holding applies not only where the state-imposed racial separation was complete but also where it was, as in Indianapolis, intentional, substantial, and continuous. See, *e.g., United States* v. *Board of Education,* 429 F. 2d 1253 (C.A. 10); *Davis* v. *School District of City of Pontiac,* 309 F. Supp. 734 (E.D. Mich.), affirmed, 443 F. 2d 573 (C.A. 6). The district court, contrary to petitioners' claim, was not applying a purely remedial standard or merely determining that petitioners had failed to eliminate school segregation; the court explicitly found that petitioners had affirmatively imposed and promoted racial segregation in the Indianapolis public schools. In affirming this finding, the court of appeals properly distinguished cases involving racial separation not caused or promoted by state action.

2. The district court's findings of *de jure* segregation in 1954 and of acts and omissions of petitioners designed to perpetuate such segregation thereafter were supported by substantial evidence contained throughout a voluminous record embracing more than 190 exhibits and a transcript of more than 2000 pages (Pet. App. B, A53). The court of appeals properly affirmed these findings as not clearly erroneous and this evidentiary question warrants no further review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1973.

DOJ-05-1973